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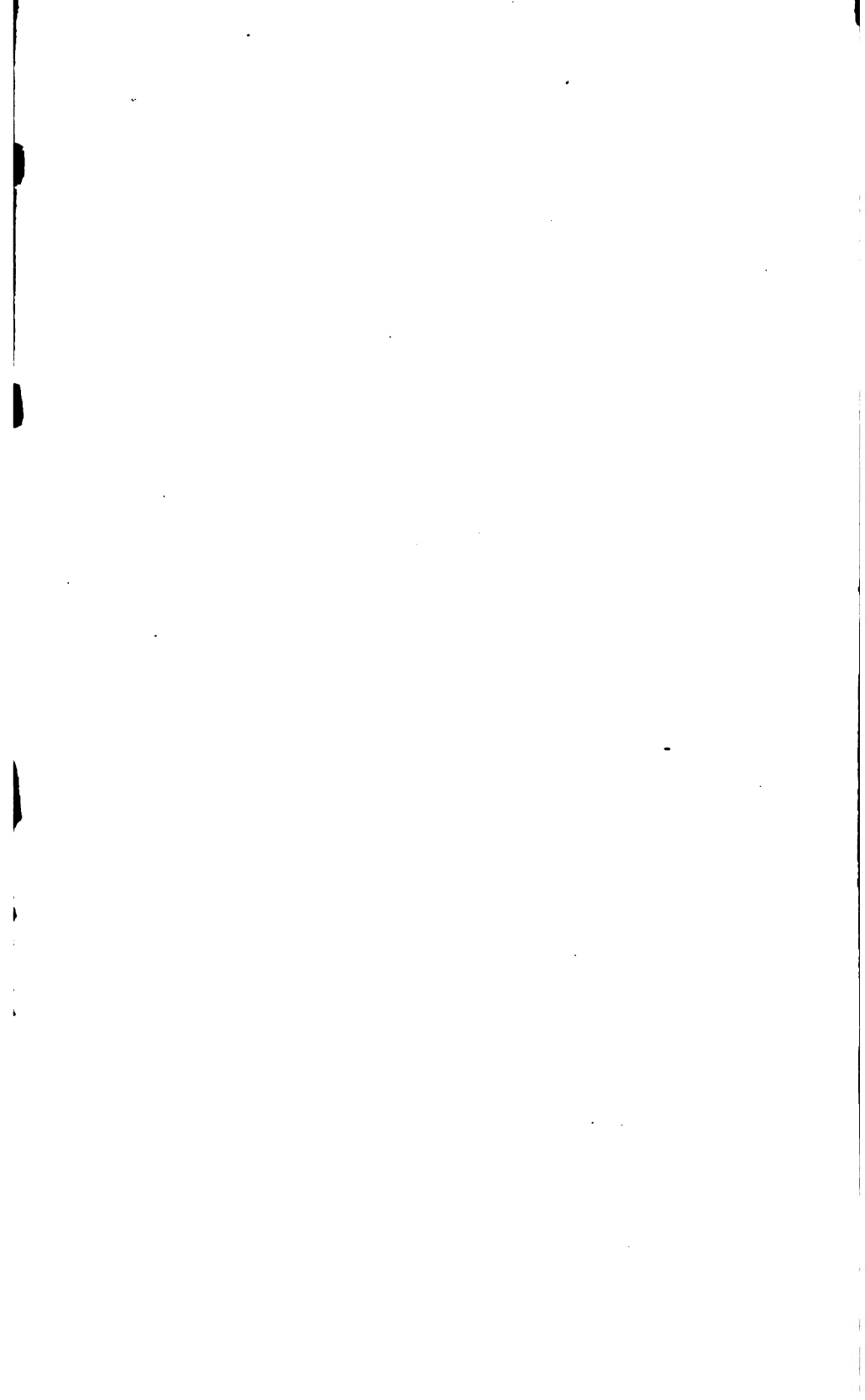
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OFFICIAL OPINIONS
OF
THE ATTORNEYS-GENERAL
OF
THE UNITED STATES,
ADVISING THE
PRESIDENT AND HEADS OF DEPARTMENTS
IN RELATION TO THEIR OFFICIAL DUTIES,
AND EXPOUNDING THE CONSTITUTION, TREATIES WITH FOREIGN
GOVERNMENTS AND WITH INDIAN TRIBES, AND
THE PUBLIC LAWS OF THE COUNTRY.

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THE OPINIONS OF ATTORNEYS-GENERAL

HON. JOSEPH McKENNA, of California,

AND

HON. JOHN W. GRIGGS, of New Jersey.

ALSO CONTAINING OPINIONS BY SOLICITOR-GENERAL

HON. JOHN K. RICHARDS, of Ohio,

AND

ACTING ATTORNEYS-GENERAL

HON. JAMES E. BOYD,

HON. HENRY M. HOYT.

**ALSO CONTAINING CITATIONS OF ACTS OF CONGRESS, THE REVISED
STATUTES, OPINIONS OF ATTORNEYS-GENERAL, AN INDEX
OF SUBJECTS, AND AN INDEX DIGEST.**



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OPINIONS
OF
HON. JOSEPH MCKENNA, OF CALIFORNIA.

APPOINTED MARCH 5, 1897.

SUPPLIES — COLUMBIA INSTITUTION FOR THE DEAF AND
DUMB.

Contracts for supplies or services in any of the departments of the Government, except for personal services, or when the public exigency requires said supplies or said services immediately, must be made after advertisement for proposals in accordance with section 3709, Revised Statutes.

The Columbia Institution for the Deaf and Dumb is in the Department of the Interior, so as to make the provisions of section 3709, Revised Statutes, applicable to it in making purchases and contracts for supplies or services.

DEPARTMENT OF JUSTICE,

December 20, 1897.

SIR: I have the honor to acknowledge the receipt of your favor of the 12th ultimo, in which you request that this Department furnish you with an opinion as to whether the Columbia Institution for the Deaf and Dumb is subject to the provisions of section 3709, Revised Statutes, as amended by the acts of April 21 and January 27, 1894, requiring that all purchases and contracts for supplies in any of the departments of the Government shall be made by advertising a sufficient time previously for proposals respecting the same.

Section 3709, Revised Statutes, reads:

“All purchases and contracts for supplies or services, in any of the departments of the Government, except for personal services, shall be made by advertising a sufficient time previously for proposals respecting the same, when the public exigencies do not require the immediate delivery of the articles, or performance of the service. When immediate delivery or performance is required by the public exigency, the articles or service required may be procured by

open purchase or contract, at the places and in the manner in which such articles are usually bought and sold, or such services engaged, between individuals."

The provisions of this section require advertisements for proposals in the case of *all* purchases and contracts for supplies or services in any of the departments of the Government, except for personal services, and except when the public exigencies require the immediate delivery of the articles or performance of the service.

The amendatory acts do not modify this requirement, but simply provide a mode for carrying it into effect. The question to be determined is whether supplies or services furnished this institution are *in* the Department of the Interior within the policy and meaning of this requirement, or to put it another way, whether this institution is *in* the Department of the Interior, in the sense that its expenditures of public money are under the supervision of the head of that Department, and subject to the regulations and restrictions thrown by law around disbursements in departments of the Government.

The Columbia Institution for the Deaf and Dumb was incorporated by the act of Congress of February 16, 1857 (11 Stat., 161). Section 2 of this act provided: "That the institution shall be managed as provided for in its present constitution, and such additional regulations as may from time to time be found necessary." Section 4 authorized the Secretary of the Interior to admit indigent pupils into the institution and pay for their maintenance and tuition out of the Treasury of the United States. The sixth section imposed on the president and directors of the institution the duty of reporting to the Secretary of the Interior, annually, the condition of the institution, number of pupils received and discharged, number remaining, branches of knowledge taught, and "also a statement showing the receipts of the institution and from what sources, and its disbursements and for what objects."

The act of May 29, 1858 (11 Stat., 293), made an appropriation for payment of salaries and incidental expenses, and provided that the deaf and dumb and the blind children of all persons in the military and naval service of the United

States should be entitled to instruction in the institution. All receipts and disbursements under this act were required to be reported to the Secretary of the Interior.

The act of June 13, 1860 (12 Stat., 30), provided for the dissolution of the Washington Manual Labor School, and the transfer of its effects to the Columbia Institution for the Deaf and Dumb.

The act of February 23, 1865 (13 Stat., 436), changed the name of the institution and did away with the provision in the original act for the instruction of the blind.

The act of July 27, 1868 (15 Stat., 232), making certain appropriations for the institution, provided for the appointment of three additional directors, one named by the President of the Senate and two by the Speaker of the House, and provided that no part of the real estate of the institution should be sold or conveyed, except under the authority of a special act of Congress. The concluding section of this act required the superintendent of the institution to report to Congress a full statement of all the expenditures made by virtue of any appropriation by Congress. All accounts for appropriations for charitable institutions in the District of Columbia were required to be audited by the First Auditor of the Treasury. The act ended with this provision: "But nothing herein contained shall take from the Secretary of the Interior the jurisdiction he now has over the subject of charities and charitable institutions in the District of Columbia."

These various provisions, as revised and codified, form Chapter V of Title LIX, Revised Statutes, sections 4859-4869.

The act of March 3, 1883 (22 Stat., 625), after making appropriations for the institution, provides:

"Hereafter the report of said institution shall include an itemized statement of all employees, the salaries or wages respectively, each of them, and also of all other expenses of said institution."

The act of August 30, 1890 (26 Stat., 371, 392), after making appropriations for the institution, provides for the admission of deaf mutes from the States and Territories, with the approval of the Secretary of the Interior.

4 SUPPLIES—INSTITUTION FOR DEAF AND DUMB.

The act of March 3, 1891 (26 Stat., 1062), making appropriations for the District of Columbia, contains the following:

"For expenses attending the instruction of deaf and dumb persons admitted to the Columbia Institution for the Deaf and Dumb from the District of Columbia, under section 4864 of the Revised Statutes, \$10,500, or so much thereof as may be necessary; and all disbursements for this object, beginning with the current fiscal year, shall be accounted for through the Department of the Interior."

Similar provisions with respect to the disbursement of appropriations for District pupils appear in the acts of July 14, 1892 (27 Stat., 164); March 3, 1893 (27 Stat., 551); August 7, 1894 (28 Stat., 243, 259); March 2, 1895 (28 Stat., 745, 761); and June 11, 1896 (29 Stat., 665, 681).

Beginning with the act of March 3, 1871 (16 Stat., 495, 500), appropriations for the construction of the institution and its current expenses have been included in the general appropriation bills, under the heading "Department of the Interior." (See act of June 11, 1896, 29 Stat., 413, 432, 437; also act of April 23, 1897, Statutes of 1897, 1, 31, 36.) The estimates submitted by the Secretary of the Treasury put construction, repairs, and current expenses under the head "Miscellaneous—Interior Department," while the appropriation to pay for District pupils is put under the head of "Miscellaneous—District of Columbia," with the special provision that all disbursements for this object shall be accounted for through the Department of the Interior.

The policy of charging the appropriations for the institution to the Interior Department has been adopted from the first.

The so-called Dockery Act of July 31, 1895, section 7 (28 Stat., 206), provides that the Auditor of the Treasury for the Interior Department "shall receive and examine * * * all accounts relating to army and navy pensions, * * * etc., and to all other business within the jurisdiction of the Department of the Interior."

In an opinion under date October 16, 1894, the Comptroller of the Treasury said (First Decisions Comptroller, p. 20):

"By reference to the sections of the Revised Statutes 4859 to 4869, relating to the Columbia Institution for the

Deaf and Dumb, and particularly to the provisions of section 4868, which requires the president and directors of said institution to report to the Secretary of the Interior 'a statement showing the receipts of the institution and from what sources, and its disbursements and for what objects,' taken in connection with the policy of Congress in appropriating sums for said institution as under the Department of the Interior, it is evident that the accounts of said institution are accounts within the jurisdiction of the Department of the Interior, and therefore under the Auditor for the Interior Department."

In the light of the foregoing facts, namely, that this institution was organized by act of Congress, and has ever since been regulated and controlled through acts of Congress; that the Government has, substantially, furnished the money to build and run it, and from the start has placed it under the supervision of the Secretary of the Interior; that the appropriations for construction and current expenses have been and are being made under the head of "The Interior Department," and even in the case of the District appropriations, to pay for the tuition of District pupils, special provision has been made that they should be accounted for "through the Department of the Interior;" that the institution has been required, right along, to make detailed reports of its transactions and more particularly its receipts and disbursements to the Secretary of the Interior; and, finally, that the Comptroller of the Treasury, whose decision under the Dockery law is final, has held that the accounts of the institution are within the jurisdiction of the Interior Department, and will not be allowed until passed upon and approved by the Secretary of the Interior, I am constrained to hold that the institution is *in* the Department of the Interior, so as to make the provisions of section 3709 applicable to it in making purchases and contracts for supplies or services. The Secretary of the Interior is charged by law with the disbursement of the annual appropriations for this institution. Without his approval no public money can be obtained by the officers of the institution. This authority entails a corresponding responsibility. The Secretary, being required to approve, should see that the money appropriated

is properly expended. The provisions of section 3709 are in the line of a wise public policy, insuring to the Government the advantage of competition in making contracts for supplies. No reason can be suggested why this institution, which is taken care of by the Government under the head of the Interior Department, should be exempted from those prudent regulations which apply not only to the Interior but to all departments in the purchase of supplies.

Your question, therefore, is answered in the affirmative.

Very respectfully,

JOHN K. RICHARDS,
Solicitor-General.

Approved.

JOSEPH McKENNA.

The SECRETARY OF THE INTERIOR.

CIVIL SERVICE.—WAR DEPARTMENT.

The volunteer pension branch of the War Department was not within the classified service, and the fact that said branch was merged into the Record and Pension Division of that Department, which is now under the civil service, would not bring positions in it within the classified service.

An army officer detailed for duty in a clerical position can not be considered as a member of the "classified service," and after separation therefrom can not be reinstated therein under Rule IX, by reason of his service during the war.

DEPARTMENT OF JUSTICE,
December 20, 1897.

SIR: I have the honor to acknowledge the receipt of yours of July 28 last, inclosing papers in the case of Maj. A. H. Nickerson, which, at the request of the Civil Service Commission, you have submitted to me for an opinion.

The facts in the case are as follows: Major Nickerson was enlisted in the military service of the United States as a second lieutenant of volunteers on the 17th day of August, 1861, and served continuously from that time in the active service of the United States in the war of the rebellion, and after the war remained in the military service until his resignation, on the 15th day of November, 1883. On the 28th day of June, 1882, Major Nickerson was, at his own

request, placed upon the retired list, the reason for his retirement being, as stated, "that he was incapacitated for active service by reason of gunshot wounds received in the battles of Antietam and Gettysburg, as described by the medical officers, and other injuries incident to the military service."

On the 1st of April, 1881, there was organized in the War Department what is called the volunteer pension branch, and in order to constitute the volunteer pension branch the following-named divisions, then existing in the War Department, were transferred and merged into it, viz: Volunteer rolls, prisoners of war, death and disability, and discontinued commissions. The volunteer pension branch thus constituted continued in existence for some time and until it was merged into the Record and Pension Division of the War Department, which is still one of the divisions of the said Department, and which is now under the classified civil service of the United States.

Upon the organization of the volunteer pension branch in the War Department, on the 1st of April, 1881, Maj. A. H. Nickerson, who was then Assistant Adjutant-General in the United States Army, was detailed as chief of that branch, and he retained this position and conducted the affairs of this branch of the War Department as its chief until he was put upon the retired list, June 28, 1882. Since the date last named he has not been employed in the civil service of the United States, and has been out of the military service since the date of his resignation, on the 15th of November, 1883.

My opinion is desired as to whether Major Nickerson is entitled to reinstatement in the classified service in the War Department, with a view to transfer to the Treasury Department, under the provisions of Rule IX.

Rule IX is as follows:

"A vacancy in any position which has been, or may hereafter be, classified under the civil-service act, may, upon requisition of the proper officer and the certificate of the commission, be filled by the reinstatement, without examination, of any person who, within one year next preceding the date of said requisition, has, through no delinquency

or misconduct, been separated from a position included within the classified service at the date of said requisition and in that department or office and that branch of the service in which said vacancy exists:

“Provided, That for original entrance to the position proposed to be filled by reinstatement there is not required by these rules, in the opinion of the commission, an examination involving essential tests different from or higher than those involved in the examination for original entrance to the position formerly held by the person proposed to be reinstated: And provided further, That, subject to the other conditions of these rules, any person who served in the military or naval service of the United States in the late war of the rebellion, and was honorably discharged therefrom, or the widow of any such person, may be reinstated without regard to the length of time he or she has been separated from the service.”

Major Nickerson has never been in the classified civil service, and the positions in the volunteer pension branch in the War Department, to which he was detailed as chief, never were and can not now be classified, because the volunteer pension branch has been merged into the Record and Pension Division, as before stated, and no longer exists. But if we assume that these positions could still be classified so as to bring them within the provisions of Rule IX, we are then confronted with the fact that Major Nickerson was in the military service of the United States, and that duties performed by him in the civil service were under detail by a military order. This being the case, I think the question you ask is settled by opinion of Attorney-General of May 9, 1890 (19 Opin., 552), to which I respectfully call your attention. The facts upon which that opinion is based seem to constitute a case analogous to this, and, following in the line of said opinion, you are advised that Major Nickerson is not eligible to be certified under Rule IX as requested by the Secretary of War.

Very respectfully, yours,

JOSEPH McKENNA.

The PRESIDENT.

BUILDING REGULATIONS, DISTRICT OF COLUMBIA.

The approval of the Secretary of War is required for projections beyond the building line in that part of the city of Washington formerly known as Georgetown.

Congress having power to prevent all projections beyond the building line in any part of the city of Washington, as now established, may permit projections upon such conditions as it may see fit to impose.

DEPARTMENT OF JUSTICE,

December 22, 1897.

SIR: The deficiency appropriation act of March 3, 1891 (26 Stat., 862, 868), contains the following provisions:

“That the action of the Commissioners of the District of Columbia in heretofore granting permits for the extension of any building or buildings, or any part or parts thereof, in the city of Washington, in the District of Columbia, beyond the building line, and upon the streets and avenues of said city, is hereby ratified, without prejudice, however, to the legal rights of the Government in the event of the destruction by fire, or otherwise, of any such structure. And hereafter no such permits shall be granted except upon special application and with the concurrence of all of said Commissioners, and the approval of the Secretary of War.”

Subsequently, by the act of February 11, 1895 (28 Stat., 650), that part of the District of Columbia embraced within the bounds and then constituting the city of Georgetown, was made “a part of the city of Washington, the Federal capital,” and “all general laws, ordinances, and regulations of the city of Washington” were “extended and made applicable to that part of the District of Columbia formerly known as the city of Georgetown.”

After calling attention to these enactments, and to the fact that, in the part of Washington formerly known as Georgetown, the fee to the streets is not vested in the United States, while in the original city of Washington it is, you request my opinion as to whether the approval of the Secretary of War is required for projections beyond the building line in that part of the city of Washington formerly known as the city of Georgetown, this question being sub-

mitted in view of a pending application requesting such action upon your part.

I have no hesitation in answering your question in the affirmative. Congress is vested by the Constitution with exclusive legislative authority within the District of Columbia. The power to establish and maintain streets, to fix a building line and prevent projections beyond it without express permission, is included in this grant of legislative authority, and is in no wise dependent upon the ownership of the fee in the streets. Congress having power to prevent all projections beyond the building line in any part of the city of Washington as now established, may permit projections upon such conditions as it may see fit to impose, one of which conditions at present is the approval of the Secretary of War.

Very respectfully,

JOHN K. RICHARDS,
Solicitor-General.

Approved.

JOSEPH McKENNA.
The SECRETARY OF WAR.

LICENSE—PATENTS.

In the manufacture of a patented breech mechanism under a certain license the United States is confined to its own shops and can not contract with others therefor.

From the right to use a patent the right to make or have made may be implied; but this implication can only be made when the right to use is unrestricted.

DEPARTMENT OF JUSTICE,
January 13, 1898.

SIR: I have the honor to acknowledge receipt of yours of October 1, 1897, inclosing a copy of a license dated January 22, 1892, granted to the Bureau of Ordnance of the Navy Department of the United States by R. B. Dashiell. Dashiell was the owner of certain letters patent granted for an improvement in breech-loading ordnance, and by this contract or license he conveyed to the Bureau of Ordnance of the

Navy Department the right to manufacture, at such place or places as might be convenient, to the end of the term for which said letters patent were granted, guns containing the patented improvements, and to use and sell the same, the consideration of this license being that the Bureau of Ordnance was to pay to Dashiell \$125 as a license fee upon every gun manufactured under the license containing the patented improvements. After this license was executed by Dashiell to the Bureau of Ordnance it seems that he sold his letters patent and the rights and franchises accruing to him thereunder to the American Ordnance Company, and this company now insists that the contract with Dashiell only confers upon the Bureau of Ordnance a *shop* license to manufacture these breech mechanisms upon the payment of a royalty of \$125 each.

My opinion is requested as to whether or not, under the license from Dashiell to the Bureau of Ordnance, the United States is confined to its own shops in the manufacture of this patented article or has the right under the license to contract with other parties for the making of the patented article for the use of the Government.

The license from Dashiell is as follows:

"This agreement, made this *22d* day of *January*, 1892, between Robert Brooke Dashiell, Ensign, U. S. Navy, party of the first part, and the Bureau of Ordnance, Navy Department, Washington, D. C., party of the second part, witnesseth, that whereas letters patent of the United States for an improvement in breech-loading ordnance will be granted to the party of the first part, dated February 9, 1892; and whereas the party of the second part is desirous of manufacturing guns containing said patented improvement: Now, therefore, the parties have agreed as follows:

"I. The party of the first part hereby licenses and empowers the party of the second part to manufacture, subject to the conditions hereinafter named, at such place or places as may be convenient, to the end of the term for which said letters patent were granted, guns containing the patented improvements, and to use and sell the same.

"II. The party of the second part agrees to make full and true returns to the party of the first part, upon the first day

of January and July in each year, of all guns containing the patented improvements manufactured by them.

"III. The party of the second part agrees to pay to the party of the first part one hundred and twenty-five dollars as a license fee upon every gun manufactured by said party of the second part containing the patented improvements.

"IV. Upon a failure of the party of the second part to make returns or to make payment of license fees, as herein provided, for ninety days after the dates herein named, the party of the first part may terminate this license by serving a written notice upon the party of the second part; but the party of the second part shall not thereby be discharged from any liability to the party of the first part for any license fees due at the time of the service of said notice.

"In witness whereof," etc.

In these subdivisions the language is "to manufacture" (I); "manufactured by them" (II); "manufactured by said party of the second part" (III). It is not, therefore, the primary signification of the language to convey the right to have manufactured. If the latter is to be declared, it must come from implication from other rights. Subdivision one is the granting one, and it may be abridged as follows:

"The party of the first part licenses and empowers the party of the second part to manufacture * * * guns containing the patented improvements and to use and sell the same."

In *Adams v. Burke*, 17 Wall., 456, the Supreme Court of the United States said:

"The right to manufacture, the right to sell, and the right to use are each substantive rights, and may be granted or conferred separately by the patentee."

Some of these rights may be extended by implication (§ 296 et seq., Walker on Patents). For instance, from the right to use, the right to make or have made may be implied. But this implication can only be made when the right to use is unrestricted. I do not think it is unrestricted in the agreement. The language is not "to manufacture, use, and sell guns containing the patented improvement," but "to *manufacture guns* containing the patented improvement and to use and sell the *same*." The language is aptly chosen to con-

fine the use and sale to guns manufactured by the United States, and, besides, this construction is supported by the other provisions of the agreement by which the right to manufacture is strictly confined.

The answer to your inquiry, therefore, is that the United States has the right only to manufacture in its own shops and not to contract with other parties.

Respectfully,

JOSEPH McKENNA.

The SECRETARY OF THE NAVY.

FOREIGN CABLES.

The President has the power, in the absence of legislation by Congress, to control the landing of foreign submarine cables on the shores of the United States. He may either prevent the landing, if the rights intrusted to his care so demand, or permit it on conditions which will protect the interests of this Government and its citizens.

If a landing has been effected without the consent or against the protest of this Government, respect for its rights and compliance with its terms may be enforced by applying the prohibition to the operation of the line unless the necessary conditions are accepted and observed.

No one has a right to land a foreign cable upon our shores and establish a physical connection between our territory and that of a foreign state without the consent of the Government of the United States.

The jurisdiction of this nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself.

The preservation of our territorial integrity and the protection of our foreign interests is intrusted in the first instance to the President.

Under the obligation entered into by the President it is his duty to preserve, protect, and defend the Constitution, to do which he must preserve, protect, and defend those fundamental rights which flow from the Constitution itself and belong to the sovereignty it created.

DEPARTMENT OF JUSTICE,

January 18, 1898.

SIR: On May 4, 1897, the French ambassador submitted to your Department the application of the French Company of Telegraphic Cables (the successor of "La Compagnie Française du Télégraphe de Paris à New York") for permission to land a cable supplementary to that which it has between Brest and Cape Cod, upon the same terms and con-

ditions as those which were imposed by the President in 1879 when the original cable was landed.

On May 11, 1897, your Department replied to this request, saying:

"The present Executive does not regard himself as clothed, in the absence of legislative enactment, with the requisite authority to take any action upon the application which you present. A bill was introduced in the last Congress giving the President of the United States express authority to authorize the landing of submarine cables on the shore of the United States, subject to conditions therein specified, but it failed to become a law. Until Congress shall see fit to clothe the President with power to act in matters of this kind he will be compelled to refrain from doing so."

On June 4, 1897, your Department addressed a note to the French ambassador calling his attention to the fact that it had been represented to the Department that a steamer from France had arrived at Cape Cod with the avowed purpose of laying the shore end of the new cable, and saying:

"It is the expectation of the Federal Government that that company (the French Cable Company) will take no steps toward laying its proposed cable from Cape Cod without express authorization of the President or of Congress, before which, as I have observed to you, a bill was introduced at the last session, but which has not yet been enacted into law. If that company should, however, take action in the manner proposed, it is proper to say that it would do so at its peril."

On June 5, 1897, another note was sent, informing the French ambassador of advices received to the effect that about 1,000 feet of the new French cable had been laid at Cape Cod the day before, and saying:

"Before taking any further action in the matter, I request that you will promptly instruct the proper authorities of the French Telegraph Company, in case the Department's information should be correct, to immediately desist from its work, pending the necessary authorization either of the President or of Congress."

The French ambassador's notes, two of the 5th and one each of the 6th and 8th of June, disclose the fact that, although the Department's notes of the 4th and 5th of June

had been promptly forwarded to the company's agent, the work of landing the cable had been completed before their receipt.

In view of the situation outlined, and the fact that Congress has not acted upon the matter, you request an official expression of my views as to the power of the President, in the absence of legislative enactment, to control the landing of foreign telegraphic cables.

What the President can do and ought to do in the case of projected cables may possibly be ascertained from what he has done; at any rate, a recurrence to the history of the landing of certain existing cables may prove of service in considering the question you propound.

The first cable from a foreign country landed upon the shores of the United States was one connecting the island of Cuba with the State of Florida, and was landed in 1867, under supposed authority of the act of Congress of May 5, 1866 (14 Stat., 44), granting to the International Ocean Telegraph Company, a New York corporation, the sole privilege for fourteen years, of laying and operating telegraphic cables from the shores of Florida to Cuba, the Bahamas, and other West India islands, upon these conditions, namely, the United States to have the free use of the cable for military, naval, and diplomatic purposes; the company to keep all its lines open to the public for the daily publication of market and commercial reports and intelligence; all messages to be forwarded in the order received; no charge to exceed \$3.50 for messages of ten words, and Congress to have the power to alter and determine the rates. (Forty-ninth Congress, second session, Senate Doc. 122, p. 63; letter of Mr. Frelinghuysen to the President, January 27, 1885).

In 1869 a concession was granted by the French Government to a company which proposed to lay a cable from the shores of France to the United States. One of the provisions of this concession gave to the company for a long period the exclusive right of telegraphic communication by submarine cable between France and the United States. President Grant resisted the landing of the cable unless this offensive monopoly feature should be abandoned. The French company accordingly renounced the exclusive privi-

lege, and the President's objection was withdrawn. The cable was laid in July, 1869; it ran from Brest, France, to St. Pierre, a French island off the southern coast of Newfoundland, thence to Duxbury, Massachusetts, and was known as the "First French Cable." It soon passed, however, into the control of the Anglo-American Company, controlling the cables connecting Great Britain with this continent. (Senate Doc. 122, pp. 63, 71).

In a note respecting this cable, dated July 10, 1869, and addressed to the French and British ministers, Mr. Fish said:

"It is not doubted by this Government that the complete control of the whole subject, both of the permission and the regulation of this mode of foreign intercourse, is with the Government of the United States, and that, however suitable certain legislation on the part of a State of the Union may become, in respect to its proprietary rights in aid of such enterprises, the entire question of the allowance or prohibition of such means of foreign intercourse, commercial and political, and of the terms and conditions and its allowance, is under the control of the Government of the United States." (Senate Doc. 122, p. 65.)

In his annual message of December, 1875, President Grant recounts his action respecting the French cable of 1869, and says:

"The right to control the conditions for the laying of a cable within the jurisdictional waters of the United States, to connect our shores with those of any foreign state, pertains exclusively to the Government of the United States, under such limitations and conditions as Congress may impose. In the absence of legislation by Congress I was unwilling, on the one hand, to yield to a foreign state the right to say that its grantees might land on our shores while it denied a similar right to our people to land on its shores; and, on the other hand, I was reluctant to deny to the great interests of the world and of civilization the facilities of such communication as were proposed. I therefore withheld any resistance to the landing of the cable, on condition that the offensive monopoly feature of the concession be abandoned,

and that the right of any cable which may be established by authority of this Government to land upon French territory and to connect with French land lines, and enjoy all the necessary facilities or privileges incident to the use thereof upon as favorable terms as any other company, be conceded." (Senate Doc. 122, p. 70.)

After adverting to the need of new cables in order to provide competition and reduce rates, President Grant continues:

"As these cable-telegraph lines connect separate States, there are questions as to their organization and control which probably can be best, if not solely, settled by conventions between the respective States. In the absence, however, of international conventions on the subject, municipal legislation may secure many points which appear to me important, if not indispensable, for the protection of the public against the extortions which may result from a monopoly of the right of operating cable telegrams, or from a combination between several lines:

"I. No line should be allowed to land on the shores of the United States under the concession from another power which does not admit the right of any other line or lines formed in the United States to land and freely connect with and operate through its land lines.

"II. No line should be allowed to land on the shores of the United States which is not by treaty stipulation with the Government from whose shores it proceeds, or by prohibition in its charter, or otherwise to the satisfaction of this Government, prohibited from consolidating or amalgamating with any other cable-telegraph line or combining therewith for the purpose of regulating and maintaining the cost of telegraphing.

"III. All lines should be bound to give precedence in the transmission of the official messages of the Governments of the two countries between which it may be laid.

"IV. A power should be reserved to the two Governments, either conjointly or to each, as regards the messages dispatched from its shores, to fix a limit to the charges to be demanded for the transmission of messages.

"I present this subject to the earnest consideration of Congress.

"In the meantime, and unless Congress otherwise direct, I shall not oppose the landing of any telegraphic cable which complies with and assents to the points above enumerated, but will feel it my duty to prevent the landing of any which does not conform to the first and second points as stated, and which will not stipulate to concede to this Government the precedence in the transmission of its official messages, and will not enter into a satisfactory arrangement with regard to its charges." (Senate Doc. 122, pp. 71, 72.)

It will be observed that President Grant rested his authority to annex conditions to the landing of a foreign cable upon his power to prevent its landing altogether, if deemed by him inimical to the interests of this Government, its people, or their business. The right to prevent carried with it the right to control.

The Direct United States Cable Company completed its line in 1875 from Ballinskelligs Bay, Ireland, to Ryebeach, N. H., by way of Torbay, Nova Scotia. This cable was laid under the act of March 29, 1867 (15 Stats., 10), conferring upon the American Atlantic Cable Telegraph Company the privilege for twenty years to land a submarine telegraph cable at any place on the Atlantic coast except the coast of Florida, and to operate the same, the Government to have the preference in its use, on terms to be agreed upon between the Postmaster-General and the company, Congress reserving the right to alter, amend, or repeal the act. Application was made to the Department of State for the privilege of landing, accompanied by the voluntary assurance of the company that no amalgamation should take place with any other company for the purpose of controlling rates.

In view of these assurances, the landing of the cable was acquiesced in by the President, Mr. Fish, in his letter to Mr. Eckert of January 2, 1877, saying:

"On receiving such assurances from the promoters of the company, the President decided to withhold resistance to the landing of their cable.

"The President adheres to the views which he expressed to Congress in December, 1875, that no line should be allowed to land on the shores of the United States which is not, by prohibition in its charter, or otherwise to the satisfaction of the Government, prohibited from consolidating or amalgamating with any other cable-telegraph line, or combining therewith for the purpose of regulating and maintaining the cost of telegraphing.

"These views are understood to have met the approval of Congress and of the people of the United States, indicated by the tacit acquiescence of the Congress, and by the expressed approval of individual members of that body, and the general approval of the public press of the country. In the same message the President announced that the right to control the conditions for the laying of a cable within the jurisdictional waters of the United States, to connect our shores with those of any foreign State, pertains exclusively to the Government of the United States, under such limitations and conditions as Congress may impose. And he further stated that, unless Congress otherwise direct, he would feel it his duty to prevent the landing of any telegraphic cable which does not conform (among others) to the point above referred to.

"The President is of the opinion that the control of the United States over its jurisdictional waters extends to the right of discontinuing and preventing their use by a cable whose proprietors may violate any of the conditions on which the Government by acquiescence or silent permission allowed its landing as well as to the resistance and prohibition of an original landing." (Senate Doc. 122, pp. 11, 12.)

The so-called "Second French Cable" was laid by La Compagnie Française du Télégraphe de Paris à New York in 1879 from Brest to St. Pierre, and thence to Cape Cod. The company applied, through the French minister, to your Department for permission to land the cable, and the privilege was granted upon substantially the conditions formulated in President Grant's message of 1875, Mr. Evarts, in his letter of November 10, 1879, to Mr. Outrey, saying:

"I have, without delay, brought the subject, together with the information conveyed by your note, to the atten-

tion of the President, and he authorizes me to say that in view of the assurances thus received from the French Government that reciprocal privileges of landing will be granted by France to any company which may be formed by citizens of the United States upon the same terms that these privileges are granted to the present or any future company of French citizens that may apply for such landing privilege; and having also received the acceptance by the directors of the *Compagnie Française du Télégraphe de Paris à New York* of the conditions prescribed by this Government, the executive permission of the Government of the United States will be granted to that company to land its cable at Cape Cod, in the State of Massachusetts. It is proper for me to add, however, that this executive permission is to be accepted and understood by the company as being subject to any future action of Congress in relation to the whole subject of submarine telegraphy as explained in my note to you of the 27th ultimo." (Senate Doc. 122, p. 76.)

The Mackey-Bennett commercial cable was laid in 1884 from the coast of Europe to the United States, by permission of the President, upon substantially the conditions outlined in President Grant's message to Congress in 1875. Mr. Frelinghuysen, in his letter of December 5, 1883, describes the attitude of the Government thus:

"This Government regards with favorable consideration all efforts to extend the facilities for telegraphic communication between the United States and other nations, and in pursuance of this sentiment the President is desirous of extending every facility in his power to promote the laying of the cables. While there is no special statute authorizing the Executive to grant permission to land a cable on the coast of the United States, neither is there any statute prohibiting such action; and I find on examination of the records of this Department that in 1875 conditional authority was given to land a French cable at Rye Beach, New Hampshire, and that in 1879 permission was given to land a cable at Cape Cod.

"These precedents seem to justify a similar concession to the promoters of the present enterprise, which there is the

less hesitation in according as they are citizens of the United States." (Senate Doc. 122, p. 84.)

On October 18, 1889, the *Compagnie Française du Télégraphe de Paris à New York* applied to your Department for permission to lay a cable from San Domingo to the United States. To this request Mr. Blaine replied, December 21, 1889:

"While the authority of the President to grant the permission you desire must be accepted, subject, of course, to the future ratification by Congress, yet there are certain conditions which he regards as absolutely essential before such provisional permission can be accorded."

These conditions are as follows:

"(1) That neither the company, its successors or assigns, nor any cable with which it connects, shall receive from any foreign government exclusive privileges which would prevent the establishment and operation of a cable of an American company in the jurisdiction of such foreign government.

"(2) That the company shall not consolidate or amalgamate with any other line or combine therewith for the purpose of regulating rates.

"(3) That the charges to the Government of the United States shall not be greater than those to any other government, and the general charges shall be reasonable.

"(4) That the Government of the United States shall be entitled to the same or similar privileges as may by law, regulation, or agreement be granted to any other government.

"(5) That a citizen of the United States shall stand on the same footing as regards privileges with citizens of San Domingo.

"(6) That messages shall have precedence in the following order: (a) Government messages and official messages to the Government; (b) telegraphic business; (c) general business.

"(7) That the line shall be kept open for daily business, and all messages, in the above order, be transmitted according to the time of receipt.

"Conditions similar to these were required of your company in 1879 in reply to its application for authority to land one or more of its cables on the Atlantic coast of this country, and assented to by the company's order November 5, 1879.

And it would seem needless to add that similar conditions have been imposed upon all cable companies desiring to land their cables from foreign countries upon the shores of the United States. It will be observed, however, that the first condition has been modified to meet a case which did not arise in 1879, of the cable for which the privilege of landing is sought being used as a link in a longer line of communication. Such a case is believed now to exist in respect to the proposed cable between the United States and San Domingo, which is understood to be only a link in a line between the United States and South America. The spirit and purpose of the first condition imposed in 1879 require that American cable companies should not now be excluded from operating and establishing lines between the United States and South America, either directly or by way of San Domingo.

"The President, therefore, directs me to say that if the foregoing conditions are satisfactory to your company, and it will first file in this Department a duly authenticated copy of the concessions granted by the Dominican Government to land its cable at Puerto Plata, together with a like certified copy of the conditions imposed by this Government, he will be willing to grant the necessary permission to your company to land its cable at Charleston, S. C., subject to the future action of Congress." (House of Representatives, Fifty-second Congress, first session, Report No. 964.)

The cable company took no steps to comply with these requirements. Nearly two years later, on December 2, 1891, the French Cable Company, through its attorney, Mr. Jefferson Chandler, renewed its application for permission to land a cable. Meantime, on December 1, 1891, the company, through the same attorney, obtained from the legislature of South Carolina a joint resolution purporting to authorize it to land a cable on the coast of that State, and, in January, 1892, from the legislature of Virginia, an act purporting to authorize it to land a cable on the shore of that State. On March 10, 1892, a joint resolution was introduced into Congress to confirm these grants. This resolution was referred to a committee, of which Mr. Wise was chairman, and to him was addressed the letter of Acting

Secretary Wharton of March 22, 1892, published in House Report No. 964, Fifty-second Congress, first session. After receiving this communication the committee reported a substitute granting the landing privilege upon the conditions prescribed by Mr. Blaine. Thereupon, for the time being, the attempt of the company to obtain the consent of Congress ceased.

On June 21, 1893, the same company, through the same attorney, applied again to the Department of State, ostensibly for permission to land a cable on the shore of Virginia, but the application was accompanied by a written argument to show that the President had no power to act in the matter, the concluding paragraph of this argument and application being:

"I respectfully request, therefore, on behalf of the applicant that the honorable Secretary of State will decide this application on its merits, and will declare that under the law the States may freely land cables, and that the Executive has no jurisdiction or disposition to prevent the landing and operation of a submarine cable from the shores of Virginia to any point permitted by the State, and that the authority of the State of Virginia to so permit cable companies to land and establish themselves on its coast is complete; and, further, that no action is required or permitted by any of the executive officers of the Government as the law now is." (Fifty-third Congress, second session, Senate Doc. No. 14; letter to Mr. Gresham.)

In response to this argument, Mr. Gresham, changing the attitude of the Government as established by the Presidents and their Secretaries of State from President Grant's time down, declined to act on the application, saying in his communication of August 15, 1893:

"There is no Federal legislation conferring authority upon the President to grant such permission, and in the absence of such legislation, Executive action of the character desired would have no binding force." (Fifty-third Congress, second session, Senate Doc. No. 14; letter of Mr. Gresham.)

October 2, 1895, Mr. Olney addressed a letter to Mr. Scrymser, president of the Central and South American Telegraph Company, in which, in answer to his letter of

September 25, 1895, he stated that *La Compagnie Française des Cables Télégraphiques* had not made application for permission to land its cables on the coast of the United States, and added:

“Furthermore, in the absence of Federal legislation conferring authority upon the Executive to grant such permission, this Department has no power to act in the matter.”

On the 24th of October, 1895, Mr. Scrymser laid before your Department certain information concerning an agreement for laying and maintaining submarine cables between France, North America, and the Antilles, to which the Government of France was a party, and suggested that the French minister be officially informed as to the policy of the Government of the United States in the matter of cable-landing privileges on our shores. Replying to this communication on October 28, 1895, Mr. Olney referred to his former letter, and said:

“There is no Federal statute conferring authority upon the Executive to grant or withhold permission to land cables on the shores of the United States. This Department has, therefore, no power to act in the matter, and I am unable to comply with your request.”

As a natural sequence of the attitude taken by your Department under Mr. Gresham and Mr. Olney, *La Compagnie Française des Cables Télégraphiques*, acting in connection with the United States and Haiti Telegraph and Cable Company and the United States and Haiti Cable Company, in 1896, landed a cable, extending from Haiti to this country, at Coney Island, New York, without permission of the Government. This Department, acting through the Attorney-General and the United States attorney, brought an injunction suit against the companies named to prevent the landing and operation of the cable, but in view of the fact that the cable had been landed, the motion for an injunction against its operation was refused. At the same time Judge Lacombe said (77 Fed. Rep., 496):

“It is thought that the main proposition advanced by complainant's counsel is a sound one, and that without the consent of the General Government, no one, alien or native, has any right to establish a physical connection between the

shores of this country and that of any foreign nation. Such consent may be implied as well as expressed, and whether it shall be granted or refused is a political question, and in the absence of Congressional action would seem to fall within the province of the Executive to decide. As was intimated upon the argument, it is further thought that the Executive may effectually enforce its decision without the aid of the courts."

It thus appears that from 1869 to August, 1893, during the terms of Grant, Hayes, Garfield, Arthur, Cleveland (first term), and Harrison, it was held by the Presidents and their Secretaries of State that the Executive has the power, in the absence of legislation by Congress, to control the landing, and, incidentally, regulate the operation of foreign submarine cables in the protection of the interests of this Government and its citizens. Against this established rule, supported by the opinion of the only United States judge who has passed upon the question, stands opposed the refusal to act of Mr. Gresham, followed by the dictum of Mr. Olney. The attitude taken by your Department under Mr. Gresham has resulted in the landing of two foreign cables upon our shores without permission of this Government and subject to no limitations or restrictions whatever. Must this condition continue? Is the President powerless to act until Congress legislates?

A foreign submarine cable which lands upon our shores, in its location enjoys rights upon our territory and in its operation provides a means of international communication, public and private, political and commercial.

The jurisdiction of this nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. (Mr. Chief Justice Marshall, *The Exchange*, 7 Cranch, 116, 136.) No one has a right to land a foreign cable upon our shores and establish a physical connection between our territory and that of a foreign state without the consent of the Government of the United States.

The preservation of our territorial integrity and the protection of our foreign interests is intrusted, in the first instance, to the President. The Constitution, established

by the people of the United States as the fundamental law of the land, has conferred upon the President the executive power; has made him the commander in chief of the Army and Navy; has authorized him, by and with the consent of the Senate, to make treaties, and to appoint ambassadors, public ministers, and consuls; and has made it his duty to take care that the laws be faithfully executed. In the protection of these fundamental rights, which are based upon the Constitution and grow out of the jurisdiction of this nation over its own territory and its international rights and obligations as a distinct sovereignty, the President is not limited to the enforcement of specific acts of Congress. He takes a solemn oath to faithfully execute the office of President, and to preserve, protect, and defend the Constitution of the United States. To do this he must preserve, protect, and defend those fundamental rights which flow from the Constitution itself and belong to the sovereignty it created. (Mr. Justice Miller, *In re Neagle*, 135 U. S., 1, 63, 64; Mr. Justice Field, *The Chinese Exclusion Case*, 130 U. S., 581, 606; Mr. Justice Gray, *Fong Yue Ting v. United States*, 149 U. S., 698, 711; Mr. Justice Brewer, *In re Debs*, 158 U. S., 564, 582.)

The President has charge of our relations with foreign powers. It is his duty to see that in the exchange of comities among nations we get as much as we give. He ought not to stand by and permit a cable to land on our shores under a concession from a foreign power which does not permit our cables to land on its shores and enjoy *there* facilities equal to those accorded its cable *here*. For this reason President Grant insisted on the first point in his message of 1875.

The President is not only the head of the diplomatic service, but commander in chief of the Army and Navy. A submarine cable is of inestimable service to the Government in communicating with its officers in the diplomatic and consular service, and in the Army and Navy when abroad. The President should, therefore, demand that the Government have precedence in the use of the line, and this was done by President Grant in the third point of his message.

Treating a cable simply as an instrument of commerce, it

is the duty of the President, pending legislation by Congress, to impose such restrictions as will forbid unjust discriminations, prevent monopolies, promote competition, and secure reasonable rates. These were the objects of the second and fourth points in President Grant's message.

The Executive permission to land a cable is, of course, subject to subsequent Congressional action. The President's authority to control the landing of a foreign cable does not flow from his right to permit it in the sense of granting a franchise, but from his power to prohibit it should he deem it an encroachment on our rights or prejudicial to our interests. The unconditional landing of a foreign cable might be both, and therefore to be prohibited, but a landing under judicious restrictions and conditions might be neither, and therefore to be permitted in the promotion of international intercourse.

I am of the opinion, therefore, that the President has the power, in the absence of legislative enactment, to control the landing of foreign submarine cables. He may either prevent the landing, if the rights intrusted to his care so demand, or permit it on conditions which will protect the interests of this Government and its citizens; and if a landing has been effected without the consent or against the protest of this Government, respect for its rights and compliance with its terms may be enforced by applying the prohibition to the operation of the line unless the necessary conditions are accepted and observed.

Very respectfully,

JOHN K. RICHARDS,
Acting Attorney-General.

The SECRETARY OF STATE.

OPINIONS
OF
HON. JOHN W. GRIGGS, OF NEW JERSEY.

APPOINTED JANUARY 25, 1898.

IMPORTATIONS OF COPYRIGHT ARTICLES.

The term "book," as construed by the courts under the copyright laws, includes a musical or other composition, though printed on but one sheet.

The importation of reprints of musical compositions copyrighted in the United States is prohibited:

The importation of music books copyrighted in the United States is prohibited.

Music books made up in part of musical compositions copyrighted in the United States are prohibited importation.

An article which is prohibited importation can not gain admission through being attached to an article which is not prohibited.

Regulations for the forfeiture or destruction of imported prohibited articles may be so framed as to provide due process of law.

DEPARTMENT OF JUSTICE,

February 7, 1898.

SIR: In your communication of November 27, you call my attention to the provisions of sections 4956, 4958, 4964, and 4965 of the Revised Statutes as amended by "An act to amend title sixty, chapter three, of the Revised Statutes, relating to copyrights," approved March 3, 1891 (26 Stat., 1106), and submit the following questions:

"1. Are the reprints of musical compositions copyrighted in the United States prohibited importation?

"2. Are music books prohibited importation in view of the special provision of the law prohibiting copyrighted books (presumably all kinds)?

"3. Are music books made up in part of musical compositions copyrighted in the United States and in part of musical compositions not copyrighted, or which have been

protected by copyrights expired, such books as are prohibited importation?

"4. Can musical compositions or music books, copyrighted and imported into the United States in contravention of law, be lawfully destroyed or forfeited without a decree by a court?"

Section 4952 as amended by the act of March 3, 1891, provides that—

"The author, inventor, designer, or proprietor of any book, map, chart, dramatic or musical composition, engraving, cut, print, or photograph, or negative thereof, * * * shall * * * have the sole liberty of printing, reprinting, publishing, * * * and vending the same."

The method of obtaining a copyright is prescribed by section 4956, as amended by this act. The first part of the section requires the author to deposit in the office of the Librarian of Congress a printed copy of the title, and two copies of the book, map, chart, dramatic or musical composition, engraving, cut, print, photograph, or chromo. The latter part of the section provides that "during the existence of such copyright, the importation into the United States of any book, chromo, lithograph, or photograph so copyrighted * * * or any plates of the same not made from type set, negatives or drawings on stone made within the limits of the United States" is prohibited.

Musical compositions are usually published by the lithographic process. The inferior grades are set from type, and occasionally reproduced by one of the numerous photographic processes.

A consideration of the entire act, its scope and purposes, leads to the conclusion that Congress intended to prohibit the importation of any of the enumerated copyrighted compositions when reprinted or reproduced by type set or by negatives or drawings on stone made outside of the United States.

The words "book, map, chart, dramatic or musical composition," etc., used in section 4952, and in the first part of section 4956, denote the intellectual composition; the words "book, chromo, lithograph, or photograph," used in the latter part of section 4956, the physical production. In the first

part Congress had in mind the intellectual work to be protected by copyright; in the latter part the mechanical processes used to place such work in salable shape.

Under the copyright laws as construed by the courts, the term "book" includes a musical or other composition, though printed on but one sheet. (*Clayton et al. v. Stone et al.*, 2 Paine, 383-391; *Drury v. Ewing*, 1 Bond, 540-545; *Higgins v. Keuffel*, 140 U. S., 428.) The reprint of a musical composition may be a "book" or "lithograph" or "photograph," according to the mechanical process used. The importation of copyrighted compositions reproduced by any of the processes mentioned in the concluding part of section 4956 is prohibited.

Your first and second questions must therefore be answered in the affirmative.

So, too, must the third question. Music books, made up in part of musical compositions copyrighted in the United States are prohibited importation. A prohibited article can not gain admission through being attached to an article which is not prohibited. A book must be treated as an entirety, and if part of it can not be imported, the whole must be excluded.

Your fourth and last question is submitted in view of the following stipulation contained in the existing convention between the United States and Canada, which bears date of January 19, 1888:

"All registered articles, ordinary letters, postal cards, and other manuscript matter, business or commercial papers, books (bound or stitched), proofs of printing, engravings, photographs, drawings, maps, and other articles manifestly of value to the sender, which are not delivered from any cause, shall be reciprocally returned, monthly, without charge, through the central administrations of the two countries in special bags or sacks, marked "Rebuts," after the expiration of the period for their retention required by the laws or regulations of the country of destination."

The last paragraph of section 4958, as amended by section 4 of the act of March 3, 1891, provides:

"The Secretary of the Treasury and the Postmaster-General are hereby empowered and required to make and enforce

such rules and regulations as shall prevent the importation into the United States, save upon the conditions above specified, of all articles prohibited by this act."

The Solicitor of the Treasury, in response to an inquiry from the Secretary of the Treasury, has expressed the opinion that the Secretary of the Treasury and the Postmaster-General have the authority, under this provision, to make rules and regulations for the destruction of music and music books imported into this country in violation of the copyright laws of the United States. From this view I am not prepared to dissent. The provision of the postal convention quoted certainly does not require the return to Canada of articles which shall become forfeited through a violation of the laws of the United States, and, in my opinion, rules and regulations for the forfeiture and, if deemed necessary, the destruction of prohibited articles may be so framed as to provide due process of law.

Very respectfully,

JOHN K. RICHARDS,
Solicitor-General.

Approved.

JOHN W. GRIGGS.

The POSTMASTER-GENERAL.

DAMAGES—ILLEGAL IMPRISONMENT.

The imprisonment of a citizen of the United States by an officer of a foreign government, without judicial process, or allegation of a violation of law, but because of an alleged disrespect of such official's authority, is such an injury as to render such government liable in damages.

Loss of time, absence from business, personal humiliation, and bodily and mental suffering resulting from a wrongful arrest and imprisonment are, under the laws of civilized countries, grounds for compensatory damages, the amount being determined in cases of this character through negotiations.

DEPARTMENT OF JUSTICE,
February 7, 1898.

SIR: On January 4, 1886, a citizen of the United States, Mr. Thomas J. Culliton, the treasurer of the dredging company then doing work on the Isthmus of Panama, was arrested

and imprisoned by the acting prefect of Colon without judicial process and without any allegation of a violation of law, but simply because Mr. Culliton's conduct was alleged by the prefect to be in disrespect of his authority. The United States consul at Colon and Admiral Jouett, who happened to be in port at that time, intervened, and Culliton was released by the order of the prefect after five hours' detention in the common jail. The statement of this outrage contained in the protest filed by Mr. Culliton with our consul at Colon April 6, 1886, is as follows:

"On the 4th day of January, 1886, about 10 o'clock a. m., the said T. J. Culliton, cashier of the American Contracting and Dredging Company, received from the prefect of Colon a letter which read (as nearly as he can recollect) as follows: 'Please place at my disposal the money and effects of the two men herein named.'

"On the foot of the prefect's letter the said T. J. Culliton noted his reply (as nearly as he can remember) as follows: 'This office has no money or effects belonging to the above-named men.' This letter was then inclosed in an envelope, addressed to the prefect of Colon, and returned to him by the person who brought it.

"At 11.30 a. m. of the same day, January 4, 1886, as the said T. J. Culliton was passing on his way from his office at Christopher Columbus, a suburb of Colon, he was halted by about six armed soldiers, and the same letter upon which he had made his indorsement was presented to him. He was asked by the officer in command of the squad of soldiers if he was the person who had written said indorsement. He replied that he was. He was then informed that he was under arrest and must go to jail, where he arrived at about 12 o'clock noon, and was lodged in jail with all the common criminals of the town. He then asked to be taken before the prefect for a hearing. He was informed that he must remain in jail until the prefect sent for him. Through the efforts of the American consul and some of his friends, the said T. J. Culliton was called before the prefect about 3.30 p. m. the same day, and informed by the prefect that his having written a reply upon the letter of the pre-

fect constituted a grave insult to the said prefect's dignity and authority, and for this reason and for no other he had been placed in jail, where he would have to remain until 5 p. m. Between 4 p. m. and 5 p. m. he was released."

Your Department having, through our minister at Bogota, presented to the Government of Colombia the claim for indemnification of Mr. Culliton in the sum of \$25,000, that Government, through its minister of foreign affairs, responds, in a communication dated February 25, 1897, insisting, among other things:

First. That Culliton's case is not one which carries a right to pecuniary indemnity. His imprisonment lasting only five hours, neither his property interests nor his health could have been damaged. His only suffering was of a mental character, which can not be appreciated and satisfied in money. The treaty between this country and Colombia (see article 13), while it guarantees to citizens of the United States in Colombia the same protection as that which is given to natives, does not guarantee indemnity for treatment such as Culliton suffered.

Second. That as a general principle of international law, governments are not responsible for trifling injuries inflicted by government agents, but the national responsibility ceases as soon as the proceeding of the offending functionary has been condemned and necessary measures taken to prevent a repetition of the abuse.

Upon these two objections to the Culliton claim, urged by the Colombian Government as matters of law, you desire the opinion of this Department.

The seventh article of the treaty between this country and Colombia stipulates that "it shall be wholly free for all merchants, * * * and other citizens of both countries, to manage * * * their own business in all the ports and places subject to the jurisdiction of each other," while, in the eleventh article, "both contracting parties promise and engage formally to give their special protection to the persons and property of the citizens of each other, of all occupations, who may be in the territories subject to the jurisdiction of one or the other."

Under this treaty it was wholly free for Culliton, as a

citizen of the United States, to manage his own business in the town and port of Colon, and he was guaranteed special protection by the Government of Colombia to his person and property while there. Nevertheless, an officer of the Government of Colombia, in flagrant disregard of these guaranties, arrested Culliton without cause, dragged him from his business, thrust him into a common jail and kept him there, in the company of common criminals, for five hours, until forced by the American consul and an American admiral to release him. And now it is contended that Culliton suffered no injury which can be measured in money. Perhaps not adequately so measured; but he suffered damages which, under our laws and the laws of civilized countries are compensated in money. The loss of time, the absence from business, the personal humiliation, the bodily and mental suffering, resulting from a wrongful arrest and imprisonment, are grounds for compensatory damages. The precise amount required to make the wronged citizen whole is determined in a suit at law by a jury, and in this case must be fixed through negotiations.

In a damage suit by a passenger for expulsion from a train Judge McIlvaine, of the supreme court of Ohio, said (23 O. S., 10, 18):

"That physical pain caused by an act of trespass on the person constitutes a legitimate ground for compensatory damages no one disputes. And why should not mental suffering as well? Is it more endurable than physical suffering? Is it a less probable consequence of a trespass against the person of another? Is the mind an object of less concern in the judgment of the law than the body? Is it any less a part of the person? Is compensation in money for mental suffering more difficult to estimate than for physical pain? I can find no good reason for affirming any of these distinctions."

In a case of wrongful arrest under humiliating circumstances, Mr. Justice Gray, speaking for the Supreme Court of the United States, said (147 U. S., 101, 111):

"In the case at bar the defendant's counsel having admitted in open court 'that the arrest of the plaintiff was wrongful, and that he was entitled to recover actual dam-

ages therefor,' the jury were rightly instructed that he was entitled to a verdict which would fully compensate him for the injuries sustained, and that in compensating him the jury were authorized to go beyond his outlay in and about this suit, and to consider the humiliation and outrage to which he had been subjected by arresting him publicly without warrant and without cause, and by the conduct of the conductor, such as his remark to the plaintiff's wife."

The second objection of the Colombian Government turns upon the use of the word "trifling." To term the injuries "trifling" is to beg the question. If they were "trifling," this Government would not present a claim based upon them. No government entitled to respect regards as "trifling" the wanton arrest and imprisonment of its citizens upon the whim of a foreign functionary. A money indemnification for such an outrage is the usual reparation demanded and received. (2 Phill. Int. Law, 4; Bluntschli Droit Int., art. 380.)

Very respectfully,

JOHN K. RICHARDS,
Solicitor-General.

Approved:

JOHN W. GRIGGS.

The SECRETARY OF STATE.

ARMY—ENLISTMENT—PARDON.

Congress has no power by legislation to abridge the effect of the President's pardon.

A person convicted of desertion from the military service and afterwards pardoned by the President, under section 1118, R. S., would be restored by reason of the pardon to all the rights and privileges of a citizen which he had anterior to such conviction.

While the President's pardon restores a criminal to his legal rights and fully relieves him of the disabilities legally attaching to his conviction, it does not destroy an existing fact that his service was not faithful and honest.

A recruiting officer has the right to reject a candidate for enlistment in the Army whose service during his previous term was not honest and faithful, notwithstanding the President's pardon of the offense.

DEPARTMENT OF JUSTICE,
February 9, 1898.

SIR: I have the honor to acknowledge the receipt of your communication of August 26 ultimo, in reference to the

case of Daniel T. Thompson. It appears that said Thompson was a private in Company A, Seventh United States Infantry, that he was tried by a court-martial, convicted of desertion, and sentenced to be dishonorably discharged from the service of the United States, forfeiting all pay and allowances due him, and to be confined at hard labor at such place as the reviewing authority may direct for the period of one year. This sentence was carried into execution, except that after Thompson had served the greater part of the period of imprisonment the remainder was remitted, and he subsequently received a full pardon from the President. Thompson has applied to reenlist in the Army, and you ask my opinion as to whether the effect of the pardon in Thompson's case has been to restore his eligibility for reenlistment. You also call to my attention that part of the act of Congress of August 1, 1894 (28 Stat., 216), which reads as follows:

"No soldier shall be again enlisted in the Army whose service during his last preceding term of enlistment has not been honest and faithful."

There can be no doubt as to the effect of the President's pardon to one who has been charged with, or convicted of, an offense against the laws of the United States.

In *Knote v. United States*, 95 U. S., 149, 153, the court declares the effect of a pardon to be as follows:

"It releases the offender from all disabilities imposed by the offense, and restores to him all of his civil rights. In contemplation of law, it so far blots out the offense that afterwards it can not be imputed to him to prevent the assertion of his legal rights. It gives to him a new credit and capacity, and rehabilitates him to that extent in his former position."

The same doctrine is plainly declared by the court in *Spencer's Case*, 22 Fed. Cas., 921. Judge Deady, delivering the opinion of this case, says:

"And when the pardon is full, it releases the punishment and blots out of existence the guilt, so that in the eyes of the law the offender is as innocent as if he had never committed the offense."

These opinions are fully sustained by Blackstone's Commentaries, book 4, ch. 31, 4.

In *Ex parte Garland*, 4 Wall., 334, the court in its opinion deals very explicitly with the question of the effect of the President's pardon, and after citing the section of the Constitution from which the President derives the authority to grant pardons, says (p. 380):

"The power thus conferred is unlimited with the exceptions stated (except in cases of impeachment). It extends to every offense known to the law, and may be exercised at any time after its commission, either before legal proceedings are taken, or during their pendency, or after conviction and judgment. This power of the President is not subject to legislative control. Congress can neither limit the effect of his pardon nor exclude from its exercise any class of offenders. The benign prerogative of mercy reposed in him can not be fettered by any legislative restrictions."

The court says further in this opinion:

"Such being the case, the inquiry arises as to the effect and operation of a pardon, and on this point all the authorities concur. A pardon reaches both the punishment prescribed for the offense and the guilt of the offender; and when the pardon is full it releases the punishment and blots out of existence the guilt, so that in the eye of the law the offender is as innocent as if he had never committed the offense."

Authorities to any number may be quoted to sustain this position, but the principle declared is so well settled that their citation is unnecessary.

The question, then, which remains to be considered is as to whether these principles shall govern the recruiting authorities of the United States Army in cases of application for reenlistment on the part of persons convicted of desertion during a previous term of service and afterwards pardoned by the President.

It can not be questioned that under section 1118 of the Revised Statutes a person convicted of desertion from the military service of the United States and afterwards pardoned by the President would be restored by reason of the pardon to all the rights and privileges of a citizen which he had anterior to such conviction, but Congress, by the act of August 1, 1894, has added a condition which must exist as

to persons applying for reenlistment in the Army. It is not in the nature of an inhibition on account of the commission of a criminal offense which the President would have the right to pardon, but it relates to previous conduct in service and affects the personal rather than the criminal character of the applicant. It is true that a soldier who has been guilty of the crime of desertion has not given honest and faithful service, and yet a failure to perform honest and faithful service on the part of a soldier does not necessarily involve a crime or an offense against the military laws of the country. There are many acts of a soldier which may be regarded under the strict rules of the requirements of the military service as unfaithful or dishonest, but of which a military court-martial would not take cognizance. The President would not be called upon to pardon such acts of a soldier, because they do not reach that grade of offense which would authorize the exercise of executive clemency, though if the soldier, during his previous term of service, has been guilty of such want of honest and faithful service, he is disbarred from reenlistment by the statute referred to.

I have pursued this line of reasoning in order to draw a distinction between a crime or offense to which the Executive clemency might be applied and the want of honest and faithful service on the part of a soldier during his term, and whilst Congress has no power, by legislation, to abridge the effect of the President's pardon, yet Congress has the right to prescribe qualifications and conditions for enlisted men, and to forbid those not possessing such qualifications, and as to whom such conditions do not exist, to enter the military service.

So, whilst the President's pardon restores the criminal to his legal rights and fully relieves him of the disabilities legally attaching to his conviction, it does not destroy an existing fact, viz, that his service was not honest and faithful.

I therefore, in answer to your question, advise you that in an application for reenlistment the officers recruiting for the military service of the United States can, under the act of Congress, inquire if the applicant has, during his previous term, performed honest and faithful service, and, if he

has not, reject his application; and this authority pertains to the recruiting service and is not affected by the pardon of the President.

Respectfully,

JOHN W. GRIGGS.

The SECRETARY OF WAR.

POSTAGE STAMPS—SUPPLIES.

Postage stamps are supplies within the meaning of section 3709, Revised Statutes.

The word "security" as used in the act of 1877 (1 Supp. R. S., 136) is an evidence of public debt, as a bond, or a certificate of deposit, or other subject of investment.

When the word "securities" is used in the property sense, it refers to bonds, mortgages, certificates of deposit, certificates of stock, etc. In this sense postage stamps are not investments or securities.

The definition given to the words "obligation or other security of the United States" in Revised Statutes, section 5413, is not intended to be general, but is limited in its application.

The transfer of a separate statute, or part thereof, from a particular act to a general revision, does not ordinarily alter its significance.

Statutory meaning, so far as it is artificial and not the natural and usual meaning, can be applied only to the exact phrase defined and to the whole of it, not to a selected portion.

Revised Statutes, section 5600, relative to the construction to be placed upon a statute, does not prevent the application of the ordinary principles which permit the courts to resort to the context and the subject-matter of the sections immediately associated with it.

Revised Statutes, section 5413, does not apply to and limit the meaning of the words "other securities of the United States," as used in paragraph 4 of the act of March 3, 1877.

The Postmaster-General should advertise for proposals for the work of engraving and printing United States postage stamps, for which work the Bureau of Engraving and Printing may be permitted to compete.

DEPARTMENT OF JUSTICE,

February 11, 1898.

SIR: You having requested my opinion as to the law governing the engraving and printing of United States postage stamps, and whether it is necessary for you to advertise for proposals for such work or to have it done at the Treasury Department, I have the honor to advise you as follows:

Section 3709, Revised Statutes, directs that all purchases and contracts for supplies in any of the Departments of the

Government shall be made by advertising a sufficient time previously for proposals respecting the same when the public exigencies do not require the immediate delivery of the articles.

In my judgment postage stamps for your Department are supplies within the meaning of this section, and such, I am informed, has been the uniform interpretation of the law by the practice of your Department.

You advise me that it has been contended that paragraph 4 of the act making appropriation for sundry expenses of the Government for the fiscal year ending June 30, 1878, and for other purposes, approved March 3, 1877, providing as follows:

“For labor and expenses of engraving and printing, namely: For * * * engraving and printing notes, bonds, and other securities of the United States * * *: *Provided*, (1) The work be performed at the Treasury Department: *And provided further*, That it can be done as cheaply, as perfectly, and as safely, and all contracts already made shall be carried out. * * * .” (Supplement Revised Statutes, second edition, Vol. I, p. 136.)

applies to postage stamps and makes it necessary that the engraving and printing of them should be done at the Treasury Department.

There is no language in the act of 1877 which would include postage stamps unless it be the words “other securities of the United States.”

In the ordinary sense of the word, and in the sense in which it is used in this section of the law of 1877, a security is an evidence of public debt, as a bond or certificate of deposit or other subject of investment. When the word “securities” is used in a property sense, it refers to bonds, mortgages, certificates of deposit, certificates of stock, etc. In this sense postage stamps are not investments or securities.

Reference is made to section 5413 of the Revised Statutes, which is as follows:

“The words ‘obligation or other security of the United States’ shall be held to mean all bonds, certificates of indebtedness, national (bank) currency, coupons, United States

notes, Treasury notes, fractional notes, certificates of deposit, bills, checks, or drafts for money drawn by or upon authorized officers of the United States, stamps, and other representatives of value, of whatever denomination, which have been or may [be] issued under any act of Congress."

And it is contended that the definition there given to the phrase "obligation or other security of the United States" is to be applied to the law of 1877, so as to attach to the words "other securities of the United States," as used in the law of 1877, the same meaning given to the words "obligation or other security of the United States" in section 5413.

Unquestionably for the purpose for which section 5413 was inserted in the Revised Statutes stamps would be classified as "obligation or other security" wherever those words occur in the immediate context of section 5413; but, in my opinion, the provisions of this section will not apply to and are not a rule of construction for the act of March 3, 1877.

Section 5413 of the Revised Statutes is classified under "Title LXX—Crimes," and is the first section of chapter 5 of this title. It was first enacted as part of a separate law approved June 30, 1864 (13 Stats., pp. 218-222), which act also contains, substantially, the penal provisions contained in sections 5414, 5430, and 5431 of the Revised Statutes. The obvious intention of Congress was to group under one heading, in one consolidated statute, all the provisions relating to crimes against the operations of the Government contained in separate acts. It is a well-known principle of statutory construction that the transfer of a separate statute, or part thereof, from a particular act to a general revision does not ordinarily alter its significance.

"When the body of statutory law is revised and reenacted, the general purpose is obvious, and such purpose is not to change the existing system, except in cases where the intention to do so is clearly specified." (*Pomeroy v. Mills*, 37 N. J. Eq., 578; *State v. Anderson*, 40 N. J. Law, 226.)

If section 5413 were to be interpreted without any reference to the provisions of section 5600 of the Revised Statutes, there could scarcely be a doubt that postage stamps were not intended to be covered by it. It would present the ordinary case of a provision of a separate statute trans-

ferred to a general revision or code in association with the same penal provisions contained in the original act, and with others of a kindred nature, to all of which the provisions of this particular section are properly applicable. Applying the well-known rules of statutory construction, above stated, the section would then refer only to those penal provisions that follow in the revised arrangement. It is suggested, however, that section 5600, Revised Statutes, forbids the application of this ordinary rule of statutory construction and prevents the drawing of any inference or presumption in this instance from the origin, collocation, and arrangement of these particular sections relating to crimes against the operations of the Government. This insistent, if sound, would make it necessary to construe the words "securities of the United States," wherever they occur in the volume of the statutes, in accordance with the meaning put upon the words "obligation or other security of the United States" by this section. An examination of the language of section 5600 will not, however, justify such a claim. All that that section does is to forbid any inference or presumption of a legislative construction to be drawn by reason of *the title* under which any particular section is placed. It does not prevent the application of the ordinary principle which permits the courts to resort to the context and the subject-matter of the sections immediately associated with it. The arrangement of laws into sections is merely for the purpose of convenience. If this whole section, 5413, were incorporated into any one of the following sections, the language would be the same, but no one would contend that it was meant to define the meaning of the words "obligation or other security of the United States" wherever those words might occur in any other part of the volume. Everyone would immediately refer that phrase to those matters immediately connected by context with the section in which those words occur. The fact that section 5413 is separated by number from the succeeding related and cognate sections does not necessarily extend its influence and effect over the whole volume of the Revised Statutes. The context manifestly evidences the intention of Congress to

apply the provisions of that section to the construction of the sections that follow, and the history of section 5413 and its associated origin with some of the succeeding sections, under the ordinary rules of statutory construction, make this perfectly plain.

The act of Congress, by virtue of which the Revised Statutes were compiled (14 Stat., p. 74, sec. 2), expressly directed the commissioners of revision to bring together all statutes and parts of statutes which, from similarity of subject, ought to be brought together; to arrange the same under titles, chapters, and sections, with headnotes briefly descriptive of the matter contained in such divisions; also with side notes so drawn as to point to the contents of the text, and with reference to the original text from which each section is compiled. In view of this explicit direction of Congress it is very clear that, while they may by section 5600 have excluded any inference or presumption of legislative construction being drawn from the title under which a section is placed, nevertheless the collocation and references to origin are intended as express aids in the work of construing the meaning of each section.

Another indication that Congress did not intend section 5413 to extend further than to the sections of the immediate context is found in the fact that by sections 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, and 13 it has enacted definitions of various words, prescribed certain formulæ for "all acts of Congress thereafter enacted," and declared the effect of future repeals.

Section 1 says:

"In determining the meaning of the Revised Statutes or of any act or resolution passed subsequent to February 25, 1871, words importing the singular number may extend and be applied to several persons or things," etc.

In the absence of similar terms applying the provisions of section 5413 to the whole Revised Statutes and to acts passed subsequently, it can only be reasonably inferred that it was not intended that it should apply further than to the immediate context.

It is also of consequence, in considering whether section 5413 is to be extended as a definition to all parts of the

Revised Statutes and to all subsequent laws passed by Congress, to look at the precise phrase which is defined. The words to which a defined meaning is fixed are "*obligation or other security of the United States.*" The phrase is put in quotation marks. This is not the phrase used in the act of 1877. The words used there are "other securities of the United States." It is not identical as a complete phrase. It is not sound construction to hold that, where by statute a particular meaning is arbitrarily put upon a certain specified phrase, the same meaning is to be put upon separate parts of the phrase. The statutory meaning, in so far as it is artificial and not the natural and usual meaning, can be applied only to the exact phrase defined and to the whole of it, not to a selected portion.

I am of opinion, therefore, that section 5413 does not apply to and does not limit the meaning of the words "other securities of the United States," as used in the portion of the act approved March 3, 1877, above quoted.

My attention is called to the fact, which I think is important in this connection, that the act of March 3, 1877, was in operation for a period of sixteen years before any suggestion was made that postage stamps were included within its provisions, and required to be prepared at the Treasury Department. I think the proper course for the Postmaster-General is to advertise for bids for furnishing the necessary postage stamps, and to allow the Bureau of Engraving and Printing to compete, as was done on former occasions.

Very respectfully,

JOHN W. GRIGGS.

The POSTMASTER-GENERAL.

BIDS.

A bidder under an advertisement for sealed proposals has the right, previous to the opening of the bids, to modify his bid by telegram, and when so modified, upon acceptance before withdrawal, will bind the bidder.

While it is customary to confirm by letter a telegraphed proposition, such confirmation is not essential.

A bid in which the name of the firm is signed by typewriter, followed by the signature of the only member of the firm, is, before acceptance, modified by telegram. *Held*, the modified bid, if authentic, would, upon acceptance before withdrawal, bind the bidder.

DEPARTMENT OF JUSTICE,
March 15, 1898.

SIR: I have your letter of the 12th setting forth that your Department advertised for proposals to be opened at 2 p. m. March 8, 1898, for furnishing all labor and material and fixing in place the boiler plant, steam heating, mechanical ventilating apparatus, etc., for the post-office, court-house, and custom-house at Milwaukee, Wis.; that among the sealed proposals the lowest were one from the Charles B. Kruse Heating Company, \$54,633; and one from the L. J. Mueller Furnace Company, \$54,633; that the latter was signed by typewriter with the above name, and bore what purports to be the signature of the only member of the firm, L. J. Mueller; and that on the morning of March 8, 1898, a telegram was received from the L. J. Mueller Company reducing its bid by \$1,200, which telegram was read at the opening of the bids. I note that the telegram does not disclose what the original bid was.

You say:

"Before awarding the contract for said work this Department requests that you will advise it whether the bid of the L. J. Mueller Furnace Company, signed in the manner indicated, is binding on said company if accepted by this Department; and also what control a bidder has over his proposal previous to the time fixed for opening the same; and whether, as a legal proposition, a bidder has the right, under an advertisement for sealed proposals, to modify by telegraph a bid submitted previous to the opening of the bids."

In answer I have to say that, in my opinion,

1. The proposal could be modified in the manner stated.
2. The signature to the telegram, which manifestly refers to the mailed bid, would cure any irregularity of the kind supposed in the signature to the latter.
3. The modified bid (if authentic) would, upon acceptance before withdrawal, bind the bidder.

It is customary to confirm by letter a telegraphed proposition in order to better authenticate it, but this is not essential. Whether the telegram was signed and sent by the bidder is a question of fact.

As you request an early answer I shall not further extend this opinion. See 9 Op., 174; 21 Op., 56; 15 Op., 649.

Respectfully,

JOHN W. GRIGGS.

The SECRETARY OF THE TREASURY.

CHIEF OF BUREAU OF YARDS AND DOCKS.

Under the practical interpretation of section 423, Revised Statutes, naval constructors are treated as officers of the Navy and their relative rank as the actual rank or grade required by that section.

An officer of the Corps of Engineers, not below the relative rank of captain, is eligible for appointment as Chief of the Bureau of Yards and Docks.

DEPARTMENT OF JUSTICE,

March 17, 1898.

SIR: In your communication of the 8th instant, after stating that the term of office of the present Chief of the Bureau of Yards and Docks would soon expire, you call my attention to the provisions of certain statutes bearing upon the subject, and request me to advise you whether a member of the Corps of Civil Engineers is eligible to appointment as Chief of the Bureau of Yards and Docks, and if so, what restrictions in regard to rank are imposed by the provisions of law applicable to the matter.

The appointment of chiefs of the several bureaus in the Navy Department is regulated by sections 421 to 426, inclusive, of the Revised Statutes (in which are incorporated the provisions of the acts of July 5, 1862, and of March 3, 1871, on the subject), and the act of March 3, 1893.

The act of July 5, 1862, reorganizing the Navy Department (ch. 134, 12 Stat., 510), established the eight existing bureaus, and in the second section made the following provisions with respect to the appointment of chiefs:

“The President of the United States, by and with the advice and consent of the Senate, shall appoint from the list of officers of the Navy, not below the grade of commander, a chief for each of the Bureaus of Yards and Docks, Navigation, Equipment and Recruiting, and of Ordnance,

and shall in like manner appoint a Chief of the Bureau of Construction and Repair, who shall be a skillful naval constructor; and shall also appoint a Chief of the Bureau of Steam Engineering, who shall be a skillful engineer, and be selected from the list of chief engineers of the Navy; and shall also appoint a Chief of the Bureau of Medicine and Surgery, who shall be selected from the list of surgeons of the Navy; and a Chief of the Bureau of Provisions and Clothing, who shall be selected from the list of paymasters of the Navy of not less than ten years' standing."

The subsequent act of March 3, 1871, which prescribes the number, rank, and pay of the officers of the various staff corps of the Navy, including the Corps of Engineers (sec. 7, ch. 117, 16 Stat., 536) and the naval constructors (sec. 9, ch. 117, 16 Stat., 536) contained, near the close of the tenth section, the following proviso (sec. 10, ch. 117, 16 Stat., 537):

"And provided further, That chiefs of bureaus may be appointed from the officers having the relative rank of captain in the staff corps of the Navy on the active list."

The commissioners who drafted the Revised Statutes treated the act of 1871, not as superseding, but as supplementing the act of 1862, and enlarging the power of the President with respect to the appointment of chiefs, so they brought the two together in section 421 with this explanation (Comr's Draft, Rev. Stat., p. 235):

"The commissioners have treated the act of 1871, cited in the margin, not as repealing or superseding the restrictions in the act of 1862 on the appointment of chiefs of bureaus, but as giving an alternative or optional power of appointment; so that the President may make a given appointment either from the class indicated by the act of 1862 or from that indicated by the act of 1871, as he judges best."

Congress adopted the revision as recommended, thus giving its apparent approval to the interpretation placed on the acts of 1862 and 1871 by the commissioners, the existing statutes reading as follows:

"SEC. 421. The chiefs of the several bureaus in the Department of the Navy shall be appointed by the President, by and with the advice and consent of the Senate, from the classes of officers mentioned in the next five sections, respec-

tively, or from officers having the relative rank of captain in the staff corps of the Navy, on the active list, and shall hold their offices for the term of four years.

"SEC. 422. The chiefs of the Bureau of Yards and Docks, of the Bureau of Equipment and Recruiting, of the Bureau of Navigation, and of the Bureau of Ordnance, shall be appointed from the list of officers of the Navy not below the grade of commander.

"SEC. 423. The chief of the Bureau of Construction and Repair shall be appointed from the list of officers of the Navy not below the grade of commander, and shall be a skillful naval constructor.

"SEC. 424. The chief of the Bureau of Steam Engineering shall be appointed from the chief engineers of the Navy, and shall be a skillful engineer.

"SEC. 425. The chief of the Bureau of Provisions and Clothing shall be appointed from the list of paymasters of the Navy of not less than ten years' standing.

"SEC. 426. The chief of the Bureau of Medicine and Surgery shall be appointed from the list of the surgeons of the Navy."

The expression "the list of officers of the Navy not below the grade of commander," in sections 422 and 423, strictly construed, applies only to officers of the line. Naval constructors belong to the staff, with relative rank only (act March 3, 1871, sec. 7, 16 Stat., 536; Rev. Stat., secs. 1402, 1477). Nevertheless, they have been treated as eligible under section 423 for appointment as chief of the Bureau of Construction and Repair, and the act of March 3, 1893 (Supplement Rev. Stat., vol. 2, p. 130), provides:

"And any naval constructor having the rank of captain, commander, or lieutenant-commander shall be eligible as chief of the Bureau of Construction and Repair."

Thus, under the practical interpretation of section 423, naval constructors are treated as officers of the Navy and their relative rank as the actual rank or grade required by the section, but it is to be observed that in no other way could compliance be had with the explicit requirement that the officer appointed chief of the Bureau of Construction and Repair be "a skillful naval constructor." Faults in

expression were disregarded in order to carry out the manifest intention of the lawmaker.

It may be contended that the interpretation of section 423 adopted by the Department and by Congress to carry out its manifest purpose with respect to naval constructors should be applied to section 422 in favor of officers of the Corps of Engineers, in which event an officer of that corps having the relative rank of commander would be eligible for appointment as chief of the Bureau of Yards and Docks.

But I am disposed to adopt the view taken by the commissioners who drafted the Revised Statutes. Section 422 restricts the President in his choice of the chiefs of the four bureaus mentioned to officers of the line not below the grade of commander, but the provision of the act of March 3, 1871, incorporated in section 421, enlarges the President's power, giving him the alternative of making the appointment "from officers having the relative rank of captain on the staff corps of the Navy on the active list." I do not feel at liberty to disregard the act of 1871 as incorporated in section 421, and in no other way can effect be given it.

It may be said that the law as thus construed discriminates against the officers of the staff corps in the matter of the appointment of chiefs of the four bureaus mentioned in section 422 by requiring them to hold a higher rank than officer of the line in order to be eligible; but the answer is, these bureaus are essentially line bureaus, while those mentioned in sections 423 to 426, inclusive, are staff bureaus, and since line officers are not eligible at all to the chiefship of staff bureaus it is not unfair to require some extra evidence of fitness in a staff officer who is to be made head of a line bureau.

The answer to your question is, therefore, that an officer of the corps of engineers not below the relative rank of captain is eligible for appointment as chief of the Bureau of Yards and Docks.

Very respectfully,

JOHN K. RICHARDS,
Solicitor-General.

Approved:

JOHN W. GRIGGS.

The SECRETARY OF THE NAVY.

CHINESE—ARREST.

Detention by an officer is in effect an arrest, and a person under detention or arrest must be furnished subsistence at the expense of the government making the arrest.

The board bills of Chinese boys remaining at Richford, Vt., after they are, by the authority of the Treasury Department, denied the privilege of coming within the United States, should not be paid by the United States pending their subsequent arrest by the United States marshal and a hearing thereafter under the Chinese exclusion acts, as they are neither under detention nor arrest.

DEPARTMENT OF JUSTICE,

March 18, 1898.

SIR: I have the honor to acknowledge the receipt of your communication of January 27, with which you inclose certain letters from the collector of customs at Burlington, Vt., in relation to the payment of board bills of Chinese boys entering the United States, pending the determination of their right to remain in this country, and a copy of a letter addressed by you to the said collector on the same subject. I also acknowledge the receipt of your communication of February 8, in which you inclose copy of a letter dated February 3 and copies of the inclosures therein referred to from the collector of customs at Burlington, Vt., further in relation to the payment of the board bills of certain Chinese; and you request an opinion from me upon the question raised by this correspondence, namely, whether the board bills of Chinese boys remaining at Richford after they are, by the authority of the Treasury Department, denied the privilege of coming within the United States, shall be paid by the United States pending their subsequent arrest by the United States marshal and a hearing thereafter under the Chinese exclusion acts.

It seems from the letters which you transmit that immediately upon the arrival of such Chinese boys they are directed by Treasury officials to return to Canada, and that they refuse to do so. Upon reporting the facts to the United States attorney for the district, warrants are made out for the arrest of the Chinese, who are taken by the United States marshal under the warrants to Burlington for trial before a United States commissioner. It seems

that with all the expedition possible two days are often consumed between the time when the Chinese are denied the privilege of coming within the United States by the Treasury officials and when they are arrested by the United States marshal; and the question is whether the board bills of the Chinese, covering this interval, should be paid by the Government.

It is, of course, an elementary principle that detention by an officer is in effect an arrest, and that a person under detention or arrest must be furnished subsistence at the expense of the government making the arrest. Upon the facts as stated, however, I am of the opinion that the treatment of the Chinese at Richford is not to be construed either as detention or as arrest. When Chinamen are denied the privilege of coming within the United States by the Treasury Department, and ordered to go back from the frontier port of entry, they are not thereby arrested or detained, but are refused permission to go by that port further within the United States, and they remain there rather than obey the order. Consequently such Chinamen remain at the port of entry voluntarily, and it is my opinion that their board bills should not be paid by the United States for the interval previous to their arrest by the United States marshal, upon complaint of the United States attorney, for hearing before a United States commissioner.

Very respectfully,

JOHN W. GRIGGS.

The SECRETARY OF THE TREASURY.

NAVIGABLE RIVERS—BRIDGES.

The Mississippi River in Minnesota, both above and below the Falls of St. Anthony, is a navigable river, not wholly within the limits of any particular State, and can not be bridged without the permission of the United States, expressed through the approval of the plans by the Secretary of War.

DEPARTMENT OF JUSTICE,

March 21, 1898.

SIR: In your communication of the 2d ultimo you state that the Eastern Railway Company of Minnesota has sub-

mitted to your Department, for approval under section 3 of the act of July 13, 1892 (27 Stat., 110), plans for a bridge across the Mississippi River in the northern part of Minnesota, above the Falls of St. Anthony. In view of the fact that the falls partially interrupt navigation, preventing the passage of boats or rafts, and permitting the passage of loose logs only (which are made up into rafts below), and that the navigable portion of the river for boats above the falls is wholly within the State of Minnesota, you request my opinion:

First. Whether the Mississippi River above the Falls of St. Anthony is a navigable river of the United States wholly within the limits of the State of Minnesota; and

Second. Whether the Secretary of War has authority, under the act mentioned, to approve the plans for the proposed bridge.

I have no hesitation in answering the first question in the negative and the second in the affirmative. The Mississippi above as well as below the Falls of St. Anthony is a navigable river of the United States, not wholly within the limits of any particular State, and it can not be bridged without the permission of the United States, expressed through the approval of the plans by the Secretary of War.

The legal questions bearing upon the navigability of a river, under similar facts to those stated by you, are considered and decided by the Supreme Court in the leading case of *The Montello*, 20 Wall., 430. The Mississippi is navigable at and over the falls, for it floats logs which are made into rafts below, thus affording a highway for that article of commerce; but if it were not, and nothing could be floated over or through the falls, nevertheless, in the eyes of the law, the continuity of the stream as a navigable river of the United States would not be destroyed, nor the desirability of preventing its obstruction, above as well as below the interruption, lessened. There are few of our freshwater rivers which did not originally present serious obstructions to an interrupted navigation; many of these obstructions have been overcome by artificial means; all of them will doubtless ultimately be so overcome; in the meantime, pending improvement, the Government treats a navi-

gable river, irrespective of falls or rapids, as an unbroken highway, entitled throughout to its care and protection.

As to the authority of the Secretary of War, under the act mentioned, to approve of the plans of a bridge across a navigable river of the United States not wholly within a particular State, I am conversant with the opinion of Mr. Attorney-General Miller (20 Opin., 488), to which you call my attention, but I prefer to adopt the construction of the act in question made by Mr. Attorney-General Olney in the case of the St. Louis and Cloquet rivers (21 Opin., 41), which was followed by Mr. Attorney-General Harmon in the East River matter (21 Opin., 293), to which I beg to refer you. I agree with Mr. Olney and Mr. Harmon in the view that the act of September 19, 1890 (26 Stat., 454), as amended by the act of July 13, 1892 (27 Stat., 110), was intended to place the navigable waters of the United States under the exclusive control of the United States, and thereafter prevent any interference with their navigability, whether by bridges, dams, or other obstructions, except by express permission of the United States, granted through its agent, the Secretary of War.

Respectfully,

JOHN K. RICHARDS,
Solicitor-General.

Approved.

JOHN W. GRIGGS.

The SECRETARY OF WAR.

ARMY—PROMOTION—REGULATIONS.

The Secretary of War is the regular constitutional organ of the President for the administration of the military establishment of the nation, and as such the rules and orders publicly promulgated through him must be received as acts of the Executive, and binding upon all within the sphere of his legal and constitutional authority.

The Secretary of War has no authority to make a regulation limiting to a specific time, expiring on a given date, the right of promotion of an enlisted man who holds a certificate of eligibility provided for by the act of July 30, 1892.

A regulation can not be promulgated requiring a successful candidate who holds such certificate of eligibility to undergo a second examina-

tion after a specified time, the proviso in section 3 of the act relative to two examinations being intended to give a nonsuccessful competitor an opportunity to retrieve himself by a reexamination. The fact that such eligible has become 30 years of age does not vacate his right to promotion under the act.

DEPARTMENT OF JUSTICE,

April 7, 1898.

SIR: I have the honor to acknowledge receipt of yours of March 2d, relative to the validity of the regulation published in General Orders, No. 79, November 26, 1892, from headquarters of the Army, for the purpose of carrying into effect the act of Congress approved July 30, 1892, providing for the promotion of enlisted men of the Army to be second lieutenants, and asking my opinion as to whether or not the Executive is empowered by that act, or by other provisions of law, to make and enforce the regulation in question limiting to a specific term expiring on a given date, the candidacy of an enlisted man who has successfully passed the final or competitive examination contemplated by the act cited.

The request for my opinion is made by you in the matter of James V. Heidt, who is a sergeant-major of the Thirteenth Regiment of United States Infantry, who passed a successful examination on December 2, 1896, before the board established under the provisions of the act of July 30, 1892, and holds a certificate in the following form:

"CERTIFICATE OF CANDIDATE FOR PROMOTION TO THE GRADE OF SECOND LIEUTENANT, UNITED STATES ARMY.

"To all to whom these presents shall come, greeting:

"Know ye, That whereas James V. Heidt, a sergeant-major of Thirteenth Regiment of United States Infantry, having been duly examined in conformity with existing laws of the United States and orders of the Department of War issued in pursuance thereof, and having been found eligible for promotion to the grade of second lieutenant in the Army of the United States:

"This is to certify That the said James V. Heidt is a candidate for promotion and entitled to all the rights, privileges, and immunities attaching to that position, and the

title candidate, in the Army of the United States. The rights, privileges, and immunities conferred in this certificate hold, during good behavior, to September 1, 1897.

“Given at the office of the Adjutant-General of the Army, Washington, D. C., this 2d day of December, 1896.

“GEO. D. RUGGLES,

“*Adjutant-General.*”

The act of July 30, 1892, authorized the President—

First, to prescribe a system of examinations of enlisted men of the Army to determine their fitness for promotion to the grade of second lieutenant; and

Second, to establish boards to consist of members and a recorder, to conduct examinations and certify the results under the system prescribed.

The powers of the board thus constituted are made plenary by having conferred upon them by the act the right to examine witnesses and take depositions, and all the necessary powers of a court of inquiry.

The act then provides that the vacancies in the grade of second lieutenant heretofore filled by the promotion of meritorious noncommissioned officers of the Army under sections 3 and 4 of the act of June 18, 1878, shall be filled by the appointment of competitors favorably recommended under this act, in the order of merit established by the final examination, and that each man who passes the final examination shall receive a certificate of eligibility, setting forth the subjects in which he is proficient and the especial grounds upon which the recommendation is based; and the proviso of section 3 of the act is:

“That not more than two examinations shall be accorded to the same competitor.”

So, these provisions of the act invested the President with the authority to prescribe the system of examinations and to appoint the boards of examiners. The duties of the boards thus established are, to hold the examinations as prescribed, and, to such of the competitors as passed, to issue certificates of eligibility as required in section 3 of the act.

General Orders, No. 79, which were issued by direction of the Secretary of War to carry into effect the act of July 30,

1892, are, in contemplation of law, the act of the President. "The Secretary of War is the regular constitutional organ of the President for the administration of the military establishment of the nation; and rules and orders publicly promulgated through him must be received as acts of the Executive, and, as such, be binding upon all within the sphere of his legal and constitutional authority." (*U. S. v. Eliason*, 16 Pet., 291.)

The question then is, whether the President, or the Secretary of War, by his authority, is empowered by the act under consideration, or by other provisions of law, to make a regulation limiting to a specific term expiring on a given date the right of promotion of an enlisted man who holds the certificate of eligibility provided for by the act.

There is no authority given to the President by the act of July 30, 1892, to thus limit the rights of a successful competitor, and the act itself provides but one way by which one holding a certificate of eligibility can be deprived of its benefits, and that is by section 4 of the act, which reads in part as follows:

"That all rights and privileges arising from a certificate of eligibility may be vacated by sentence of a court-martial."

Therefore, one who passes a successful examination and becomes a certificate holder, unless his certificate is vacated by sentence of a court-martial, is entitled, under the provisions of section 3 of the act of June 18, 1878, which are incorporated in the present act to that extent, to promotion as second lieutenant after the graduates of the Military Academy shall have been provided for and assigned. Nor could the regulation requiring a successful candidate who holds a certificate to be subjected to another examination after a certain time be sustained under the provisions of the statute. It is evident that no such construction can be placed upon the statute. The proviso in section 3 for two examinations can not refer to one who has already passed and been certified as eligible. Undoubtedly this proviso was intended to give an unsuccessful competitor an opportunity to retrieve himself at a reexamination, when, if successful, he would be entitled to a certificate of eligibility. The act provides for a certificate of eligibility to such as

pass the final examination. Then the fact that one holds a certificate of eligibility is proof that he has passed the final examination. Certainly the authors of the law did not contemplate that there was to be more than one final examination, because, if the examination is final, that is the end of it, and unless the competitor passes a satisfactory final examination he is not entitled by law to hold a certificate of eligibility.

My opinion, therefore, is that the matter of time undertaken to be prescribed by General Orders, No. 79, and the regulation for a second examination of those who have already passed a successful examination and hold certificates of eligibility, are eliminated in considering the rights of those holding such certificates of eligibility to promotion under the provisions of the act of July 30, 1892. It was obviously the intention of this law to give an enlisted soldier who had, by his practice, experience, his actual training in the Army, upright conduct, and faithful service shown himself to be meritorious, an opportunity for promotion, and when he had passed the examination and received a certificate of eligibility, he was then upon the same footing as one who held a diploma from the Military Academy of the United States, and was entitled to promotion to such vacancy as might exist in the grade of second lieutenant in the Army of the United States, after the graduates of the Military Academy, who are given the preference by law, are commissioned and assigned. A graduate of the Military Academy is by law entitled to be assigned when a vacancy occurs. So is one who is certified as eligible under the act of July 30, 1892, and it would seem to be as consistent to say that if the former is not promoted within a certain period after graduation he shall return to the Academy and secure a new diploma as that the latter by lapse of time shall cease to be eligible unless he passes another examination.

It is not important that I should consider the question raised by the brief of Heidt as to the form of the certificate issued by the board of examiners. It is true that the said certificate does not set forth the subjects in which Heidt was found to be proficient and the especial grounds upon which

the recommendation is based. But this is an omission which I do not think affects the rights and privileges of the one holding the certificate. The certificate states in express terms that Heidt has been duly examined in conformity with the existing laws of the United States and orders of the Department of War issued in pursuance thereof, and is found eligible for promotion to the grade of second lieutenant in the Army of the United States.

I must therefore conclude that in case of vacancy in the grade of second lieutenant in the Army Heidt is eligible to promotion to fill it, notwithstanding the lapse of time since he was certified.

You also request my opinion in the matter of John Robertson, a sergeant of Troop C, Second Cavalry, United States Army. Robertson's case presents the same points as that of Heidt, except since he was examined and obtained the certificate of eligibility he has become 30 years of age. I do not think that this vacates his right to promotion under the act. The provision is—

“That all unmarried soldiers under 30 years of age, etc., * * * may compete for promotion under any system authorized by the act.”

The competition provided for unquestionably refers to the examination, for, after examination and certificates of eligibility, there can be no competition between those holding certificates, for the order in which they are to be promoted is governed by the grade of proficiency certified by the board, those standing highest in the examination being first entitled.

Very respectfully,

JOHN W. GRIGGS.

The SECRETARY OF WAR.

CIVIL SERVICE—DISTRICT OF COLUMBIA.

The officers and employees of the District of Columbia are not officers and employees of the General Government of the United States, but of the municipal corporation known as the District of Columbia. Such officers and employees are as distinct from the civil service of the United States as would be the officers of any city government in one of the States of the Union from the civil service of the State itself.

The civil-service act of January 16, 1883, can not lawfully be applied to the officers and employees of the District of Columbia.

DEPARTMENT OF JUSTICE,

April 28, 1898.

SIR: In response to your request for my opinion as to whether or not the civil-service act approved January 16, 1883, entitled "An act to regulate and improve the civil service of the United States," applies to the clerks and other employees of the District of Columbia, I have the honor to advise you as follows:

It will be perceived that by the very title of the act its scope is limited to the "civil service of the United States."

The different provisions of the body of the act all indicate that it is intended to apply only to such officers and employees as can strictly be called officers or employees of the United States.

The third subdivision of section 6, which provides for the classification of subordinate places, clerks, and officers in the public service, confines its operation to the heads of the Executive Departments of the Government and to heads of different offices, meaning thereby, undoubtedly, offices in the executive branch of the Federal Government.

Section 7 of the civil-service act specifically provides as follows:

"Nor shall any officer not in the executive branch of the Government be required to be classified hereunder."

By the act passed June 11, 1878 (20 Stats., 102), it is declared that the District of Columbia shall remain and continue a municipal corporation. This same act provided for the appointment by the President, with the advice and consent of the Senate, of three commissioners, who were constituted the governing and executive body of the said District. It was directed that these commissioners should be deemed and taken as officers of such municipal corporation.

In the case of *Metropolitan Railroad Company v. District of Columbia* (132 U. S., 1) the legislation relating to the organization and government of the District of Columbia was reviewed. It was there decided that the form of government which prevailed in the District of Columbia and city of Washington prior to 1871 was strictly municipal in its

character; that the Government of the United States, except so far as the protection of its own public buildings and property was concerned, took no part in the local government any more than any State government interferes with the municipal administration of its cities.

The court then considered the modifications made in the form of the District government subsequently to 1871 and including the act of June 11, 1878, and expressly decided that the corporate capacity and corporate liabilities of the District of Columbia remained the same as prior to 1871, and that its character as a mere municipal corporation had not been changed. In the case of *Barnes v. District of Columbia* (91 U. S., 540) it was contended that the board of public works, which at that time performed the same functions subsequently conferred upon the Commissioners of the District by the act of 1878, was not a department or subordinate agency of the District, but a Federal commission. This view was expressly rejected by the court in the Barnes case, where it was held that the District of Columbia was strictly a municipal corporation, competent to sue and liable to be sued upon contract or for negligence.

It was also expressly declared that the District constituted a municipal corporation proper as distinguished from a corporation established as an agency of the government creating it.

The decision in the Barnes case and in the case of *Metropolitan Railroad Company v. District of Columbia* (132 U. S., 1) was expressly affirmed by the Supreme Court in *District of Columbia v. Woodbury* (136 U. S., 450). The statutes relating to the government of the District have not been materially altered since these cases were decided.

These citations and decisions make it very clear that the officers and employees of the District of Columbia are not officers and employees of the General Government of the United States, but of the municipal corporation known as the District of Columbia. They receive their compensation from the moneys of the District, half of which are contributed through appropriation by Congress and half by taxation upon the property of the inhabitants of the District. They are as distinct from the civil service of the United States as would be the officers of any city government in

one of the States of the Union from the civil service of the State itself.

I therefore advise you that the provisions of the civil-service act can not lawfully be applied to the officers and employees of the District of Columbia.

Very respectfully,

JOHN W. GRIGGS.

The PRESIDENT.

CIVIL SERVICE COMMISSION—TIME OF LABOR.

Section 7 of the act of March 15, 1898, requiring of clerks not less than seven hours labor a day does not apply to the Civil Service Commission, or to its clerks and employees.

The term "executive departments" in the Federal statutes refers only to those departments specified in section 158, Revised Statutes, to which has since been added the Department of Agriculture.

No board, commission, bureau, or office which is not expressly or by implication, under the control of the head of one of the Executive Departments can be considered as belonging properly to an Executive Department.

The Civil Service Commission is not attached in anywise to any of the Executive Departments, nor is it subject in anywise to the control of any of the heads of such departments.

Section 7 of the act of March 15, 1898, requires seven hours of labor each day, and does not permit of the allowance of half an hour for luncheon within the seven hours.

DEPARTMENT OF JUSTICE,
Washington, D. C., May 4, 1898.

SIR: I am in receipt of your request for my opinion upon the two following questions:

"First. Do the provisions of section 7 of the act entitled "An act making appropriations for the legislative, executive, and judicial expenses, etc.," approved March 15, 1898, whereby it is made the duty of the heads of the several Executive Departments, in the interest of the public service, to require of all clerks and other employees in their respective departments not less than seven hours of labor each day, except Sundays and days declared public holidays by law or executive order, apply to and include the Civil Service Commission of the United States and its clerks and employees?

"Second. Does the provision of section 7 aforesaid, requiring seven hours of labor each day, permit of the allowance of half an hour for luncheon within the seven hours required?"

With reference to the first question stated, I have to advise you that in my opinion the provisions of section 7 of the above-mentioned act do not apply to the Civil Service Commission or its clerks and employees.

The section by its terms applies to "the heads of the several Executive Departments." By the Executive Departments, when that term is used in the Federal statutes, is properly understood only those departments specified in section 158 of the Revised Statutes, to which has since been added by subsequent legislation the Department of Agriculture. The whole of Title IV of the Revised Statutes, embracing sections 158 to 198, inclusive, is made up of provisions applicable to all the Executive Departments. Titles V, VI, VII, VIII, IX, X, XI, and XII relate, respectively, to the governments of the respective Executive Departments, each of which is represented by one particular head. The heads of these departments compose the Cabinet of the Executive. No board, commission, bureau, or office which is not expressly or by implication under the control of the head of one of these departments can be considered as belonging properly to an Executive Department.

The Civil Service Commission was created by act of Congress approved January 16, 1883. It is not attached in any wise to any of the Executive Departments, nor is it subject in any wise to the control of any of the heads of those departments. There is nothing in the act constituting the commission which makes it subject to any regulation or control except that of the President himself. It follows, therefore, that when an act of Congress refers, as does the act of March 15, 1898, to "heads of the several Executive Departments," it does not embrace and can not properly be applied to any branch, office, or bureau which is not under the control of one of the Executive Departments presided over by a Cabinet officer.

With reference to the second question submitted, I answer in the negative. The provision of the act referred to is that "the heads of the several Executive Departments shall

require not less than seven hours of labor each day." An employee is not engaged in labor when taking his meals, nor when going to or returning from his appointed place of labor. The proper interpretation of the statute in this respect is that seven hours of service shall be rendered to the Government by the clerks and employees in the Executive Departments, and such service can only be performed by the actual engagement by the employees in their allotted duties or by their readiness at their proper place of business to engage in such duties at any moment they may be required.

Very respectfully,

JOHN W. GRIGGS.

The PRESIDENT.

SEAL FISHERIES—BERING SEA.

Preliminary proceedings, even before a magistrate, need not be technically accurate in alleging the offense.

Article 6 of the regulations concerning the seal fisheries, enacted into law by the Governments of the United States and of Great Britain after the award of the Paris arbitration tribunal, forbids the use of firearms excepting outside Bering Sea, during the open season.

The presence of a shotgun upon a sealing vessel was made a violation of article 6 of the regulations concerning the seal fisheries by Congress, but such principle does not apply to British vessels in the absence of a British statute to the same effect. In the absence of such British statute it is improper to seize a British vessel unless there be good reason to believe she had been actually guilty of violating article 6.

The seizure of a vessel for violation of clause 1, paragraph 2, of the Bering Sea award act, and of section 10 of the President's proclamation, in that a gun and ammunition were aboard, is equivalent to a seizure under article 6 of the regulations concerning the seal fisheries, enacted into law by the Governments of the United States and of Great Britain.

DEPARTMENT OF JUSTICE,
May 4, 1898.

SIR: I have the honor to acknowledge the receipt of yours of the 6th ultimo, inclosing a copy of a note from the British ambassador and a memorandum received from him, and asking my opinion as to whether the statements contained in the note and memorandum "constitute any reason for

modifying the views expressed in the opinion of the Attorney-General of October 3, 1895," concerning claims growing out of the detention of the British vessels *Wanderer* and *Favorite* in the seal fishing ground.

The Paris arbitration tribunal having decided adversely to the contention of the United States concerning its jurisdiction over Bering Sea, certain claims growing out of seizures ordered by this Government were submitted to a commission. The present claims are not based upon orders of the Government, but alleged improper action of naval officers proceeding under laws of this Government and Great Britain to which no objection of want of jurisdiction exists. These laws were passed to carry into effect the views of the tribunal of arbitration as to the future protection of the seal fisheries. One of the regulations proposed and enacted into law by both Governments was as follows:

"ART. 6. The use of nets, firearms, and explosives shall be forbidden in the fur-seal fishing. This restriction shall not apply to shotguns when such fishing takes place outside of Bering Sea during the season when it may be lawfully carried on."

By other regulations made law a closed season was established, from May 1 to July 31, for Bering Sea and part of the North Pacific Ocean. It will be observed that article 6 permits the use of shotguns in the North Pacific out of the closed season.

The *Favorite* appears to have been seized on August 24 in Bering Sea. She had seal skins on board and a shotgun. As the facts were submitted to my predecessor the barrels of this shotgun were sawed off to a length of 12 inches, but it was found that it would shoot accurately for a distance of 50 yards. It is now said that it was wholly unfit for killing seals and was kept for signaling purposes only.

The *Wanderer* was seized on June 9, 1894, in the North Pacific. She had on board seal skins and a shotgun with ammunition.

The former vessel was, therefore, fishing at a proper time and place, so far as appears, but was found where shotguns were prohibited to be used in taking seals. The latter

was taken during the closed season, and at a time and place where the use of shotguns was prohibited.

Both vessels were turned over to the British, as by law provided, and the British admiral released both on the ground, as I am now informed by the memorandum, that no proper charges had been made against them.

As for the *Favorite*, she is said to have been held by the seizing officer on the ground that she had on board a double-barreled shotgun, in contravention of article 6 of the Paris award and of the United States act of Congress.

It is strenuously insisted that no law prohibited the having on board a shotgun, that no offense was expressly alleged, and that the master should be informed of what offense his vessel was accused, just as would be the case of a person who is arrested.

All this may be admitted, although when the range of possible charges is confined to two or three the importance of the last-mentioned principle is considerably diminished. In this case the master was told that he had on board a gun, and that he was consequently supposed to be violating article 6 of the Paris award, which prohibited the use of guns in seal taking at the place of his arrest, and did not prohibit having on board a gun.

It is a recognized principle that preliminary proceedings, even before a magistrate, need not be technically accurate in alleging the offense. (*Southworth v. U. S.*, 151 U. S., 179.) These naval officers were not supposed to be lawyers, nor to make any of the pleadings in the case. Here the master was advised that a trial under article 6 (which is incorporated in the British statute as part of it) was contemplated. His vessel, with its skins, and a note of the date and place of seizure, with a reference to the gun as the instrument used in violating article 6, were turned over to the British in order that a libel might be filed and a trial had.

It seems to me, as it did to my predecessor, that there was no defect in the allegation such as would by itself justify a release of the vessel without trial.

Article 6 says that no such gun shall be used "in the fur-seal fishing." The vessel was engaged in the fur-seal fishing and had the gun on board. This having on board was

alleged to be in contravention of article 6—that is, to imply a using in the fur-seal fishing.

It may or may not be that the captor supposed the presence on board sufficient to constitute in itself a using “in the fur-seal fishing;” but the master and the proctor were advised that a violation of article 6 was believed to have occurred—that is, that a gun had been used in the fur-seal fishing. It is not supposable that the captor believed that two different offenses were covered by article 6—that of using and that of having on board.

I am unable to perceive that the captor intended to allege any offense other than that of using a gun in the fur-seal fishing, since that offense is the one and the only one prohibited by the article on which he expressly grounded his seizure.

As for the character of the gun, this involves a matter of disputed fact, not for me to pass upon. I may say, however, that the question here being the existence of a reasonable suspicion merely, the gun may have been unfit for seal fishing and yet have been reasonably believed to be useful. If it was manifestly so unfit, the seizure was not only illegal, but doubtless made in bad faith.

I am of opinion, therefore, that the statements now made do not constitute a reason for modifying in any important respect the views expressed in the opinion of my predecessor, so far as the *Favorite* is concerned.

The *Wanderer* case is not very different from that of the *Favorite*. She was seized “for the possession of an unsealed gun and ammunition in contravention of the Bering Sea award acts, 1894, clause 1, paragraph 2, as well as of section 10 of the President’s proclamation.”

She had skins on board, was taken in the North Pacific, during the closed season, and there is no dispute about a gun and ammunition having been concealed on board at the time of seizure.

The chief reliance in this case is upon the failure to make a proper charge. It therefore becomes necessary to examine the law and proclamation referred to.

Clause 1, paragraph 2, of the British act of 1894 contains no mention of guns except by embodying article 6 already

discussed, along with the other articles establishing the closed season, during which seal killing was prohibited.

Section 10 of the President's proclamation refers to the same articles as prescribing the prohibited acts, and confines itself to establishing a presumption of an intent to violate them by reason of having on board skins or apparatus for killing.

The reference to clause 1, in connection with the possession of a gun and ammunition, was equivalent to a reference to article 6, and the reference to the proclamation, section 10, in the same connection, was equivalent to an allusion to the presumption of an intent to violate article 6 by reason of having on board this gun and ammunition.

It is true this vessel may have been guilty of two offenses, that of killing seals in the closed season and that of using the gun; but which of these two was intended to be charged is no further doubtful than that both may have been so intended, and not a violation of article 6 only.

What has been said of the form of charge in the case of the *Favorite* applies here; and I should not omit to call attention to the explanation which the proclamation furnishes of the form of charge adopted. The proclamation shows that these captors understood that the possession of the gun raised a presumption of the violation of article 6 and did not constitute a distinct offense.

I therefore see no reason for modifying the views of my predecessor in this case.

But something must now be added to those views. It seems to be true that, in the case of both these vessels, section 10 of the President's proclamation or of the act of Congress embodied in it was regarded as the law of the case, and as establishing the principle that the mere presence of apparatus for killing seals upon a vessel in the North Pacific or Bering Sea established a presumption that article 6 had been violated. In other words, given the presence of a shotgun fit for killing seals, it was unimportant whether the gun itself or circumstances otherwise established a reasonable suspicion of the actual use of guns in killing seals.

This was a principle which Congress saw fit to apply to

American vessels, and these naval officers seem to have presumed it to be equally applicable to British.

This appears to be the natural inference from the like form of charge in both cases, the reference in one to the act of Congress and the express reference in the other to section 10; also from the fact as stated in the memorandum that "the skins on board the *Favorite* were examined by the seizing officer and were found to have been legitimately taken."

But the principle was not applicable to British vessels in the absence of a British statute. Without that it was improper to seize a vessel, whatever guns were on board, unless, in the opinion of the seizing officer, there was good reason to believe she had been actually guilty of violating article 6. The vessel was entitled to the officer's deliberate opinion as to her guilt or innocence. (*U. S. v. Southworth*, 161 U. S., 639.)

It is not, therefore, the form of the charge that is objectionable so much as the perfunctory manner in which, as it seems, the seizure was made. There should have been a deliberate inquiry into the probable guilt of the vessel, and the facts stated lead to the belief that nothing of the kind took place.

This being so, and the cases against the vessels being otherwise somewhat weakened by the facts stated in the memorandum, I am of opinion that the illegality of the seizures should, assuming the correctness of the facts now furnished, be regarded as established. It does not follow, however, that the Government, which did not authorize such seizures, has incurred any liability. The general rule is that the torts of an officer may subject him to suit, but, not being within his orders as agent of the Government, the latter is not responsible for them.

International claims, however, are not always settled upon strict legal principles, and whether it is advisable to adhere to them in this case is a matter primarily for your consideration.

Respectfully,
The SECRETARY OF STATE.

JOHN W. GRIGGS.

INVALID IMPORTATIONS—DESTRUCTION.

When property is of trifling value, and its destruction is necessary to effect the object of a valid law, it is within the power of the legislature to order its summary destruction without obtaining a forfeiture by judicial proceedings.

By section 4958, Revised Statutes, as amended by section 4 of the act of March 3, 1891, the Secretary of the Treasury and the Postmaster-General, in making and enforcing rules and regulations with reference to the importation of music and music books in violation of copyright laws, may provide for their summary destruction without notice.

If their nature and value demand a notice and hearing before destruction, the rules and regulations adopted may be framed to provide for the same.

DEPARTMENT OF JUSTICE,

May 6, 1898.

SIR: The last paragraph of section 4958, as amended by section 4 of the act of March 3, 1891, relating to copyrights, provides:

“The Secretary of the Treasury and the Postmaster-General are hereby empowered and required to make and enforce such rules and regulations as shall prevent the importation into the United States, save upon the conditions above specified, of all articles prohibited by this act.”

In an opinion given the Postmaster-General on February 7, 1898, I stated I was not prepared to dissent from the view expressed by the Solicitor of the Treasury that, under this provision, the Secretary of the Treasury and the Postmaster-General have authority to make rules and regulations for the destruction of music and music books imported into this country in violation of the copyright laws of the United States; and, in this connection, used this language:

“In my opinion rules and regulations for the forfeiture and, if deemed necessary, the destruction of prohibited articles, may be so framed as to provide due process of law.”

The use of the phrase “due process of law” has led to the inquiry, in your communication of the 1st ultimo, whether the forfeiture and, if need be, the destruction of music and music books imported into this country in violation of our copyright laws, may be had “without first obtaining a decree of forfeiture by a court of competent jurisdiction?”

The phrase "due process of law" does not necessarily mean by a judicial proceeding. (*McMillan v. Anderson*, 95 U. S., 37, 41.) It is not necessary, in every instance, to obtain a forfeiture by a judicial proceeding in order to destroy property illegally used. There are cases where property illegally used may be summarily destroyed. When the property involved is of trifling value and its destruction is necessary to effect the object of a valid law, it is within the power of the legislature to order its summary destruction. (*Lawton v. Steele*, 152 U. S., 133, 141.) To require a judicial proceeding to condemn a sheet of music or a music book, wrongfully imported and subject to forfeiture, would effectually prevent, in the case under consideration, the execution of the copyright laws. The expense of such a proceeding would largely exceed the value of the music or music books. The return of the music or music books to the foreign seller would afford him an inducement to violate the law again.

By the provision under consideration, the Secretary of the Treasury and the Postmaster-General are not only empowered but *required* to make and *enforce* such rules and regulations as shall prevent the importation of prohibited articles. To prevent effectually the importation of prohibited music and music books, may require, under certain circumstances, their summary destruction without notice; and if their nature and value demand a notice and hearing before destruction, the rules and regulations to be adopted may be so framed as to provide for the same, and protect the interests of all parties concerned, without preventing or impeding the enforcement of the copyright law by putting the Government to the necessity of resorting in the first instance to the courts.

Respectfully,

JOHN K. RICHARDS,
Solicitor-General.

Approved.

JOHN W. GRIGGS.

THE SECRETARY OF THE TREASURY.

ENTRY AND RETURN CERTIFICATES OF CHINESE.

The original entry certificates of Chinese merchants and others exempted must be issued by their Government or the government where they last reside.

The return certificate of Chinese persons entitled to return to the United States under the contingency contemplated by Article II of the treaty of 1894 with China must be accompanied by a certificate as to the facts, made by the Chinese consul at the port of departure.

Certificates issued to Chinese persons of the exempted class by the Chinese consul at Havana in the absence of certification by a consular officer of the United States should not be accepted by the customs officials of the United States.

The return entry of such Chinese is allowed only upon strict compliance with the terms of the treaty and the regulations formed thereunder.

The terms upon which the representation of the interests of the United States at Havana was committed or entrusted to the British consul during the existing war with Spain were informal and did not specifically include the service of viséing certificates to be issued to Chinese persons.

Chinese certificates viséed by the British consul at Havana during the absence of the United States consular officers may be accepted by the authorities of the United States, provided this duty is voluntarily performed by such officer with the consent of the British Government.

DEPARTMENT OF JUSTICE,
May 6, 1898.

SIR: I have the honor to acknowledge the receipt of your communication of May 2, relative to certain correspondence passing between the Department of State and the Chinese minister at this capital, copies of which have been transmitted to your Department, in the course of which inquiry was made by the Chinese minister as to whether certain Chinese certificates, viséed by the British consul at Havana during the absence from Havana of the consular officers of the United States, would be accepted by the proper authorities of the United States. You inform me, further, that the collector of customs at New York has requested instructions from you as to the acceptance of certificates issued to Chinese persons of the exempt class by the Chinese consul at Havana but without certification by the consular officer of the United States, and whether in case it shall be decided that such certificates should not be accepted, certificates viséed by the British consul at Havana should be regarded

as sufficient evidence to entitle the holders to admission to this country, and in view of the above facts and the condition of affairs now existing, you request my opinion as to your authority to direct the acceptance of certificates viséed by the British consul at Havana, to whom, it is understood, the consul-general of the United States turned over all matters affecting American interests prior to his recent departure from that city.

The certificates in question here may be, so far as the statement of the facts discloses, the "original entry certificates" of merchants and the other classes of Chinese subjects referred to in section 6 of the act of May 6, 1882 (as amended by the act of July 5, 1884), and in Article III of the convention between the United States and China, proclaimed December 8, 1894; or they may be the "return certificates" of Chinese laborers provided for in Article II of said treaty. The question obviously does not refer to the "residence certificates" required of Chinese laborers and allowed to Chinese persons other than laborers by the act of May 5, 1892 (as amended by the act of November 3, 1893), although such residence or registration certificates are the basis under the Treasury regulations of the return certificates to which certain Chinese laborers, under the treaty of 1894, are entitled. It appears, further, that Chinese merchants formerly engaged in business in this country are not required to take out a return certificate for use upon application for reentrance, but shall establish their former status as merchants here by the testimony of two credible witnesses other than Chinese (sec. 2, act of 1893, *supra*); and the original entry of Chinese laborers is now absolutely prohibited by the act of 1882, as amended, the act of 1892, and the treaty of 1894, and their return entry is allowed only upon strict compliance with the terms of the said treaty and the regulations framed thereunder (21 Op., 424). The certificates referred to in your queries may therefore embrace the original entry certificates of merchants and the other exempt classes and the return certificates of laborers under the treaty.

Your request does not impose upon me the duty of considering the terms and requirements on which the respective

certificates may be granted or accepted by the customs officials under the Chinese exclusion acts, the treaty of 1894, the regulations of the State Department and of your Department, and the rulings and decisions upon the subject, except so far as to state generally that the original entry certificates of merchants and others exempt must be issued by their government or the government where they last resided, and the return certificate of the laborers entitled to return must, in the contingency contemplated by Article II of the treaty of 1894, be accompanied by a certificate as to the facts made by the Chinese consul at the port of departure for return to the United States. Moreover, it may be noted that the laws and regulations require that the customs officials, in making the return certificates based on the registration certificate, shall make a thorough examination of the facts and of the accuracy of the applicant's statements, and that the diplomatic or consular representatives of the United States, before indorsing certificates submitted to them, shall examine into the truth of the statements set forth therein, and if the statements are untrue they shall refuse to indorse the certificate. It is quite clear from the language of section 6 of the act of 1882, as amended—which is to be read in connection with Articles II and III of the treaty of 1894—that the respective certificates embraced in this inquiry should be indorsed or viséed by the diplomatic consular representatives of the United States in the foreign country from which the certificate issues, or at the port or place from which the person named therein is about to depart.

I am therefore of the opinion that certificates issued to Chinese persons of the exempt classes by the Chinese consul at Havana, but without certification by a consular officer of the United States, should not be accepted by the customs officials.

We thus come to the last question in the case, namely, whether certificates viséed by the British consul at Havana, assuming that all the other requirements of the law have been complied with, should be regarded as sufficient evidence to entitle the holders to admission to this country, and this question will be answered by the answer to the

question, To what extent is the British consul at Havana a consular officer of the United States?

By the comity existing between friendly nations and under diplomatic practice, governments, at the request of friendly powers, often give to their diplomatic and consular officers authority to take upon themselves, with the consent of the government within whose jurisdiction they reside, the function of representing such powers at places where the latter have no consular officers. The United States has understood this authority to be restricted to the extending of protection to the citizens or subjects of the friendly power and to the granting of the services and good offices of our representatives, with their own consent, to meet what has ordinarily been a fortuitous and temporary exigency of the friendly government. (United States Consular Regulations, 1896, p. 60, par. 174; p. 178, par. 453.)

However, an indication of the proper course to be pursued in this matter may be obtained from the laws relating to the verification or certification of invoices. The act of March 1, 1823 (3 Stat., 733), section 2844, Revised Statutes, expressly provides that such certification may be made in the absence of the consul or commercial agent of the United States by the consul of a friendly nation; or if there is no such consul in the country, by two merchants; and although the customs administrative act of June 10, 1890, provides for the authentication of invoices by the consul, vice-consul, or commercial agent of the United States of the proper consular district, it is to be observed that section 29 of the latter act, repealing various prior provisions of law on the subject, does not repeal section 2844, although it repeals sections 2843 and 2845. While, therefore, the statutes relating to the granting of certificates to Chinese do not contain provisions similar to those in section 2844, it may be said that those statutes, so far as they authorize the granting of certain consular certificates to Chinese, were passed for the purpose of executing the treaties between the United States and China, and that it seems desirable, so far as consular action in such a matter is necessary, that the acts of British consuls, as the representatives of American interests in the Spanish dominions during the existing war, should, so far

as possible, be accepted by our authorities, whether those consuls be considered as acting United States consuls or as British consuls acting for the United States. And the word "consul" is to be understood to mean any person invested by the United States with, and exercising, the functions of consul-general, vice-consul-general, consul or vice-consul. (Sec. 4130, Rev. Stat.)

The request of the friendly power implies the granting of sufficient authority by it in the premises. But the functions should be accepted by the officer in question and the approval of his government should be signified. In the existing circumstances of the war with Spain the consent of its government would not be obtained, but may be implied in view of ordinary diplomatic practice, or may perhaps, for the purposes of the present inquiry, be ignored. The terms upon which the representation of the interests of the United States at Havana was committed or intrusted to the British consul at that city were informal and did not specifically include such service as is here contemplated. But while it may generally be the case that this friendly representation is confined to the extending of protection and good offices, I perceive no valid reason which forbids the British consul in question—consenting himself, and with the approval of his Government—to perform such ordinary and routine duties of the United States consul as the indorsing or viséing of Chinese certificates; always providing that he acts in such case in accordance with the strict requirements of our law and the regulations thereunder.

I therefore answer your last inquiry, whether you may properly authorize the acceptance of the Chinese certificates in question under the visé of the British consul at Havana, in the affirmative.

Very respectfully,

JOHN W. GRIGGS.

THE SECRETARY OF THE TREASURY.

ATTORNEY-GENERAL—DUTIES.

The question as to whether the parts of a vessel which a British subject proposes to take to Alaska by ocean steamer will be subject to duty, being a hypothetical one, is not answered.

The Attorney-General is precluded from giving an opinion upon a matter not actually or presently arising in the administration of a Department.

DEPARTMENT OF JUSTICE,

May 10, 1898.

SIR: I have the honor to acknowledge the receipt of your communication of March 12, requesting my opinion as to whether the sections or parts of a vessel, fitted ready to be put together, and which a British subject proposed to bring out by ocean steamer to Alaska for use on the Yukon River, will be subject to duty, or, on the other hand, may properly be regarded as "materials * * * necessary for the construction of vessels built in the United States for foreign account or ownership" within the purview of section 12 of the act of July 24, 1897.

From the language of your inquiry there is some reason for thinking that the exact facts in the case are not before you, and that the condition of the vessel as to stage of completion, and the use to which she may be put after arrival in Alaska or the Dominion of Canada, are not accurately known to you. Furthermore, it would appear that the question is a hypothetical one—that the vessel may or may not have been purchased, and may or may not have been shipped pending your reply to the query addressed to you. In this view of the case, therefore, I am of the opinion that it is not a matter actually or presently arising in the administration of your Department, and that I am consequently precluded from answering your inquiry.

Very respectfully,

JOHN W. GRIGGS,

The SECRETARY OF THE TREASURY.

LEAVES OF ABSENCE—CUSTOMS SERVICE.

Sundays and days declared to be legal holidays by law or Executive order should be included in the annual leave to be granted under the terms of the act of March 15, 1898.

The per diem officers and employees of the customs service are upon the same footing, with reference to leaves of absence, as clerks in the Executive Departments at Washington.

A clerk or other employee of an Executive Department of the Government whose duties are performed at a place other than the seat of Government is as much entitled to the benefits of the act of March 15, 1898, with reference to leaves of absence, as one whose duties are performed in the city of Washington.

The subordinate officers and employees of the customs service, wherever employed, are entitled to the privileges of the statute with reference to leaves of absence, whether they receive annual or per diem compensation.

Unless otherwise specially stated, the statutory provisions for notice, etc., of a given number of days are usually considered to include Sundays and holidays in the count.

MAY 11, 1898.

SIR: I have the honor to acknowledge receipt of yours of April 19, ultimo, directing attention to section 7 of the act approved March 15, 1898; also to section 5 of the act approved March 3, 1893, and section 4 of the act approved March 3, 1883, referring to leaves of absence to be given clerks and other employees in the several Executive Departments of the Government, and requesting my opinion as to whether Sundays and days declared to be holidays by law or Executive order should be included in the annual leave to be granted under the terms of the act approved March 15, 1898.

You also call my attention to the act of August 28, 1890, providing for leave of absence for officers and employees in the customs service of the Government who receive per diem compensation, and request my opinion as to whether the act approved March 15, 1898, above referred to, applies to such per diem officers and employees, and whether they are entitled to receive the same leave of absence as is provided for clerks and employees in the several Executive Departments at Washington, D. C.

I think the first question propounded in your communication is answered substantially by the Attorney-General in an opinion rendered February 10, 1894 (20 Opin., 718).

In the act of March 3, 1883, in providing for the hours of labor, Sundays and holidays so declared by law or Executive order were excepted. This was the case in the act

approved March 3, 1893, and also in the act approved March 15, 1898. So the laws in existence at the time of the rendition of the opinion above referred to were substantially the same as the last act of Congress, which is the act of March 15, 1898.

The opinion above cited was given in response to a request for a construction of section 5 of the legislative appropriation act of March 3, 1893, relative to leaves of absence. In this opinion is the following:

"You also ask me whether, in computing the annual leave and sick leave under the first proviso, Sundays and holidays occurring during absence should be charged against the absentee. Upon this question I am informed that the practice of the different departments has not been uniform. No aid, therefore, is afforded by departmental practice in the solution of this question. It has been the practice of this Department to charge Sundays and holidays against the absentee when they intervene during the period of absence. * * * In the absence either of general and uniform departmental practice, or of specific direction from Congress, it is my opinion that the practice of this Department is the correct interpretation of the law. Unless otherwise specially stated, statutory provisions for notice, etc., of a given number of days are usually considered to include Sundays and holidays in the count, at least unless the period of notice is very short. Statutes, therefore, often specifically except them. This conclusion is somewhat strengthened by the fact that the statutory annual leave is made thirty days, or, as near as may be, one-twelfth of the calendar. It would seem to be the Congressional intent that each employee might take a month's vacation, the length thereof being expressed in days on account of the varying lengths of the calendar months.

"Your last question is, therefore, to be answered in the affirmative."

Section 7 of the act approved March 15, 1898, is substantially the same as section 5 of the act of March 3, 1893, and the above opinion is sufficient answer to your first question.

In regard to your second question, I have found no sub-

sequent legislation which repeals the act of August 28, 1890, 26 Stat., 362. This statute reads as follows:

“That all officers and employees of the customs service of the Government who receive a per diem compensation shall be entitled to receive the same leave of absence as is provided for clerks and employees in the several Executive Departments at Washington, District of Columbia, by chapter one hundred and twenty-eight, section four, of the United States Statutes at Large, volume twenty-two, pages five hundred and sixty-three and five hundred and sixty-four, approved March third, anno Domini eighteen hundred and eighty-three.

“Sec. 2. That the Secretary of the Treasury shall make all rules and regulations necessary to carry the provisions of this act into effect.”

It is true that when this was enacted it referred to the previous act of March 3, 1883, which of course has been supplanted by the act of March 3, 1893, and more recently by the last act, of March 15, 1898; but the provisions in each of the three last-named acts being substantially the same, it is not inconsistent with the act now in force to hold that the act of August 28, 1890, is still existing law.

It was evidently the intention of Congress to place these per diem employees in the customs service upon the same footing as the clerks in the Executive Departments at Washington who receive salaries, and give them the same leaves of absence without stopping their pay.

By the act of July 6, 1892, employees of the Bureau of Engraving and Printing were allowed leave of absence with pay and the piece workers in this Bureau were included by the express terms of the act, the compensation of the latter during leave being determined by the average amount of work done during the several months of the year. While the Bureau of Engraving and Printing act is not involved in the question now presented for consideration, it is a late act which shows the intention of Congress to provide leaves of absence for Government employees who are paid by the day, and this strengthens the view before stated as to the effect of the act of August 28, 1890.

In the concluding paragraph of your letter you ask this

further question: Whether the act of March 15, 1898, can be properly applied to customs officers and employees who receive an annual compensation?

All officers and employees in the customs service of the United States belong to the Treasury, which is one of the Executive Departments of the Government, and are under its control. The act of March 15, 1898, includes within its provisions clerks and other employees of the Executive Departments of the Government of whatever grade or class, and no distinction is made as to whether these clerks and other employees are engaged in work at the seat of government or elsewhere. I think it a proper construction of the statute, therefore, to say that a clerk or other employee of an Executive Department of the Government whose duties are performed at a place other than the seat of government is as much subject to the provisions of the act and as much entitled to its benefits as one whose duties are performed in Washington.

There may be some question as to what is meant by the term "officers," but the same word is used by Congress in the statute providing for leaves of absence for per diem employees of the customs service of the Government, and is evidently intended to apply to the subordinate officers of the said service. I think the term is entitled to the same construction when applied to customs officers who receive annual compensation.

It has been the practice of the Treasury Department for many years to grant leaves of absence to subordinate officers and employees in the customs service who are employed away from the seat of government, and article 1161 of the Customs Regulations, made in 1892, provides for leaves of absence to subordinate officers and employees in this service under the authority of the Secretary of the Treasury not to exceed thirty days in any fiscal year. This regulation had been in practice for some time when the act of August 28, 1890, was passed, and it is fair to assume that Congress had in mind the fact that leaves of absence were being thus granted to the subordinate officers and employees in the customs service who received annual salaries and by the act

last named intended to put per diem employees in the said service upon the same footing.

I therefore conclude that the subordinate officers and employees of the customs service, wherever employed, are entitled to the privileges of the statute whether they receive annual or per diem compensation.

Very respectfully,

JOHN W. GRIGGS.

The SECRETARY OF THE TREASURY.

NAVY APPOINTMENTS.

The President may appoint the officers of the line and staff of the Navy authorized by the act of May 4, 1898, without the advice and consent of the Senate.

A commission issued pursuant to the foregoing act should show upon its face that it is the commission of the President.

Many things may be done by the head of an Executive Department without the actual signature of the President, which, when done, are his acts; but in such case the documents should declare it to be the act of the President performed by the head of the Department as his representative.

MAY 16, 1898.

SIR: I have the honor to acknowledge the receipt of your communication of the 14th instant, referring me to the provisions of the act of Congress entitled "An act making appropriations for the naval service for the fiscal year ending June 30, 1899, and for other purposes," approved May 4, 1898, and requesting my opinion as to whether the officers of the line and staff of the Navy which the President by this act is authorized to appoint from civil life are to be nominated by the President and appointed by and with the advice and consent of the Senate or whether the President has power to appoint them without the intervention of the Senate.

The provision of the bill referred to which authorizes these appointments reads as follows:

"And whenever, within the next twelve months, an exigency may exist which, in the judgment of the President, renders their services necessary, he is hereby authorized to appoint from civil life and commission such officers of the

line and staff not above the rank or relative rank of commander and warrant officers, including warrant machinists, and such officers of the Marine Corps not above the rank of captain, to be appointed from the noncommissioned officers of the corps and from civil life, as may be requisite. *Provided*, That such officers shall serve only during the continuance of the exigency under which their services are required in the existing war: *And provided further*, That such officers so appointed shall be assigned to duty with rank and pay of the grades established by existing law, and warrant machinists shall be paid at the rate of one thousand two hundred dollars per annum."

The appointments provided for by this legislation are not such as by the Constitution are required to be made in any particular way. It was within the province of Congress to prescribe by whom and how these additional officers should be chosen, appointed, and commissioned. Congress might have directed that they should be appointed by the President, by and with the advice and consent of the Senate, but such was not the method actually provided for. The provision of the statute is that the President is authorized to appoint. I see no ground whatever for holding that the advice and consent of the Senate is requisite to a lawful appointment under this legislation.

An examination of kindred enactments relating to appointments in the Navy, as well as appointments in the Army, indicates that Congress frequently discriminates between appointments to be made by the President alone and appointments to be made by the President by and with the advice and consent of the Senate. For example, section 1369, Revised Statutes, provides that all appointments in the Medical Corps shall be made by the President, by and with the advice and consent of the Senate; section 1378 contains a similar provision with reference to appointments in the Pay Corps; section 1394 provides in a similar manner for the appointment of cadet engineers as second assistant engineers; section 1396 contains a similar provision as to chaplains in the Navy; section 1382 empowers the President alone to appoint a paymaster of the fleet; section 1393 authorizes the President to appoint an engineer of the fleet;

section 1403 authorizes cadet engineers of certain merit to be immediately appointed as assistant naval constructors; section 1405 authorizes the President to appoint as many boatswains, gunners, sailmakers, and carpenters as may in his opinion be necessary and proper; section 1411 authorizes the Secretary of the Navy to appoint acting assistant surgeons for temporary service; section 1414 authorizes the Secretary of the Navy to appoint storekeepers on foreign stations.

The act of May 11, 1898, providing for a volunteer brigade of engineers and an additional force of enlisted men specially accustomed to tropical climates, directs that the officers of the immune volunteer forces shall be appointed by the President, by and with the advice and consent of the Senate.

The consent of the Senate not having been required by Congress in the act submitted for my opinion, I therefore advise you that such consent is unnecessary, and the President may make such appointments without submitting the same to the Senate for confirmation.

You ask further whether, under the act above quoted, it is necessary for the President to sign the commissions of the officers appointed, or whether it is one of those cases in which the Secretary of the Navy may issue a commission, stating therein that it is by direction of the President, and appending only his own signature.

In my opinion the commission ought, upon its face, to indicate that it is the commission of the President. The act directs that the President shall commission the officers so appointed. The actual sign manual of the President is not necessary. Under the practice in the Navy Department and in other Executive Departments many things may be done by the head of the Department without the actual signature of the President, which, when done, are the acts of the President himself; but in such instances it is proper that the instrument, whether it be a commission or other document, should declare the act to be an act of the President, performed by the head of the Department as his representative.

Very respectfully,

JOHN W. GRIGGS.

The SECRETARY OF THE NAVY.

ATTORNEY-GENERAL—SILVER COINAGE.

To authorize the Attorney-General to express an opinion upon a question of law propounded it is necessary that a statement of facts be submitted, showing that the question has actually arisen in the administration of a department in an existing case calling for action.

He is not authorized to answer an inquiry made of the Treasury Department with reference to an increase in the amount of subsidiary silver coinage, whether regarded as an abstract question of law or an inquiry into the legality of the course of a predecessor in office in matters not now demanding official action.

DEPARTMENT OF JUSTICE,

May 27, 1898.

SIR: In your communication of the 23d ultimo you state that your Department is in receipt of a letter from Hon. Charles W. Stone, chairman of the Committee on Coinage, Weights, and Measures of the House of Representatives, in which the following question is propounded:

“Will you kindly inform me what authority there is, under existing law, to increase the amount of the outstanding volume of subsidiary silver coinage above \$50,000,000, as provided by act (joint resolution) of July 22, 1876, except as increased by the recoinage of trade dollars into subsidiary silver coin?”

You state further that Mr. Stone's inquiry was submitted by the Director of the Mint to the Solicitor of the Treasury, whose opinion thereon you transmit. In this opinion the Solicitor of the Treasury reaches the conclusion that “the joint resolution is a limitation upon section 28 of the coinage act of 1873, and that all the outstanding subsidiary silver coin in excess of \$50,000,000 has been put in circulation without authority of law.”

You request, as the subject is one of great importance, that I give you my “opinion thereon, as to whether the joint resolution of July 22, 1876, limited the provisions of section 28 of the act of February 12, 1873, as to the issue of subsidiary silver coin in exchange for gold coin.”

The only statement of facts accompanying the question is with respect to the fractional and subsidiary silver coined from 1792 to July 14, 1875, the date of the resumption act, which amounted to \$140,227,266.80.

Section 356 of the Revised Statutes provides that "the head of any Executive Department may require an opinion of the Attorney-General upon any question of law arising in the administration of his Department." To authorize the Attorney-General to express an opinion upon a question of law propounded by the head of a Department, it is necessary that a statement of facts be submitted showing that the question has actually arisen in the administration of his Department in an existing case calling for action. It does not appear from your communication that a question of law has thus arisen.

The transmission by you of Mr. Stone's inquiry does not authorize the Attorney-General to answer it, whether regarded as an abstract question of law relating to your authority in certain contingencies, or an inquiry into the legality of the course of your predecessors in matters not now demanding official action on your part. See 21 Opin., 73, 174; 20 Opin., 614, 723.

Respectfully, *

JOHN K. RICHARDS,
Acting Attorney-General.

THE SECRETARY OF THE TREASURY.

PENSIONS—UNITED STATES COMMISSIONERS.

The act of June 7, 1888, with reference to administering oaths to pensioners free of charge, only applies to the officers authorized to administer oaths at the time of the passage of that act.

United States commissioners are not required to administer oaths to pensioners and their witnesses in the execution of pension vouchers free of charge.

JUNE 9, 1898.

SIR: I have the honor to acknowledge receipt of yours of the 3d instant, inclosing a letter from the Commissioner of Pensions, and also extract copy of the report of Special Examiner Charles D. Sloan, relative to E. E. Greenleaf and U. N. McCullough, United States commissioners at Huntsville, Ala. You state that these commissioners administer the oath to pensioners and witnesses in the execution of their vouchers for payment of pension and charge a fee

of 25 cents therefor, and you ask my opinion as to whether the said commissioners are included in the provisions of the act of June 7, 1888. The portion of the said act to which you refer I take to be the following clause:

“And provided further, That all United States officers now authorized to administer oaths are hereby required and directed to administer any and all oaths required to be made by pensioners and their witnesses in the execution of their vouchers for their pensions free of charge.”

The office of United States commissioner was not in existence at the time the above provision became a law, that office having been created by section 19 of the act approved May 28, 1896 (ch. 252, 29 Stat. L., 184). The officers charged with the particular duties which have since devolved upon United States commissioners at the time the act of June 7, 1888, was approved were known as commissioners of the circuit courts. By the act above referred to, which created the office of United States commissioner and abolished that of commissioner of the circuit court, United States commissioners have the same powers and perform the same duties as were theretofore imposed upon commissioners of the circuit courts. The commissioners of the circuit courts had no general authority to administer oaths, their power in this respect being confined to the right to administer such oaths as were necessary in the discharge of certain official duties prescribed by law. So United States commissioners, by reason of being invested with the powers theretofore existing in commissioners of the circuit courts, would not have authority generally to administer oaths. This authority, however, was conferred upon United States commissioners by the act which created them, being found in the latter clause of section 19 of the said act, which reads as follows:

“United States commissioners and all clerks of United States courts are hereby authorized to administer oaths.”

I therefore conclude that, as the provision in the act of June 7, 1888, above referred to, used the language *“That all United States officers now authorized to administer oaths”* (which must mean such as were authorized to administer oaths at the time the act was passed), it can not include United States commissioners—officers created since this

enactment and who have since been vested with authority to administer oaths generally.

There is, however, one matter which should be corrected, and that is the fee charged, according to the report of your examiner, by United States commissioners for administering an oath. The examiner reports that 25 cents is charged. In the fee bill for United States commissioners, sec. 21, act of May 28, 1896, you will find that the fee of a United States commissioner for administering an oath (except to witness as to attendance and travel) is 10 cents.

Very respectfully,

JOHN W. GRIGGS.

The SECRETARY OF THE INTERIOR.

ARMY OFFICERS—VOLUNTEERS.

The commission of the attorney-general of the State of South Dakota as an officer in the Volunteer Army is not vacated by reason of section 1222, Revised Statutes.

The provision of section 1222 that no officer of the Army on the active list shall hold any civil office, etc., applies only to Regular Army officers.

An army officer on the active list is one not only actively, but permanently engaged in the military service of the Government.

While an officer in the Volunteer Army may be said to be actively engaged in the military service, he is not permanently so engaged, and the Government does not need nor demand a complete and final severance of his relation with civil life.

DEPARTMENT OF JUSTICE,

June 10, 1898.

SIR: I am in receipt of your communication of the 3d instant, in which you request my opinion upon a question of law growing out of the following facts:

At the time of the recent call for volunteers Melvin Grigsby was attorney-general of the State of South Dakota. While thus holding a civil office the President appointed and commissioned him a colonel in the volunteer service. Subsequently, in a telegram dated the 31st ultimo, the governor of South Dakota informed you "that Colonel Melvin Grigsby of the Third Cavalry has this day drawn his pay as attorney-general of South Dakota and that he assumed to

be such attorney-general," and asked you whether Colonel Grigsby was "to be continued as colonel of the Third Cavalry."

Section 1222 of the Revised Statutes provides:

"No officer of the Army on the active list shall hold any civil office, whether by election or appointment, and every such officer who accepts or exercises the functions of a civil office shall thereby cease to be an officer of the Army, and his commission shall be thereby vacated."

Upon a reference, the Judge-Advocate-General of the Army, in his indorsement of the 1st instant, expressed the view "If Colonel Grigsby has held or exercised the functions of the office of attorney-general of South Dakota since he became an officer of the Army, he thereby 'ceased to be an officer of the Army' and his commission was thereby vacated."

It is to be observed that the view expressed is not restricted to the case presented. The governor of South Dakota does not state that Colonel Grigsby, since his acceptance of a commission in the volunteer service, has exercised any of the functions of the office of attorney-general. He states that Colonel Grigsby "has this day drawn his pay as attorney-general and assumed to be such attorney-general." The presumption is that he assumed to be attorney-general by drawing his pay, but for what time he drew his pay does not appear.

If, however, the statement of the governor were amended so as to present a case of the exercise of the functions of the office of attorney-general by Colonel Grigsby since he became an officer in the Volunteer Army, I should hold that the provisions of section 1222 do not apply to vacate his commission, for the reason that he is not an "officer of the Army on the active list" within the meaning of the statute.

While it is true that the act of April 22, 1898, entitled "An act to provide for temporarily increasing the military establishment of the United States in time of war, and for other purposes," under which Colonel Grigsby was appointed and commissioned, provides that the Volunteer Army shall be "subject to the laws, orders, and regulations governing the Regular Army," the act clearly points out the distinction

between the Regular Army, "the permanent military establishment which is maintained both in peace and war" (section 3), and the Volunteer Army, which "shall be maintained only during the existence of war" (section 4). Section 4 specially provides:

"That all enlistments for the Volunteer Army shall be for a term of two years, unless sooner terminated, and that all officers and men composing said army shall be discharged from the service of the United States when the purposes for which they were called into service shall have been accomplished, or on the conclusion of hostilities."

Title XIV, of the Revised Statutes, which regulates the Army of the United States, contains sections which in terms are applicable only to the Volunteer Army, sections which in terms are applicable only to the Regular Army, and sections whose applicability depends upon the character of their provisions. Sections which in language are restricted, or in provisions are appropriate only to the permanent establishment—the Regular Army—can not, of course, be held to apply to the Volunteer Army.

For example, chapter two of Title XIV, providing for the retirement of army officers, clearly has no application to the Volunteer Army, organized for simply temporary service. This chapter creates two lists of regular army officers—the active and the retired list—a distinction which does not obtain in the Volunteer Army. When, therefore, section 1222 places a restriction on every "army officer on the active list," it plainly refers to regular army officers. An army officer on the active list is one not only actively but permanently engaged in the military service of the Government. Having chosen the Army for his career, and being actively engaged therein, the statute properly prohibits him from accepting or exercising the functions of a civil office.

While an officer in the Volunteer Army may be said to be actively engaged in the military service, he is not *permanently* so engaged. He is called out to meet an emergency, and must be discharged when the purpose for which he entered the service has been accomplished. Unlike the regular army officer, he has not selected the military serv-

vice for a profession. He has simply responded to a patriotic call, and expects, when the war is over, to return to civil life. His term of military service is uncertain and contingent. He may be taken from his civil duties for a few months, for a year, for two years at the most. The Government does not need nor demand a complete and final severance of his relations with civil life. He may be able to make arrangements to bridge over his absence, and on his return resume his former work. Whether he is to be permitted to do this, and retain a civil office during a temporary absence, is a matter for determination by those to whom he is accountable for the proper discharge of the duties of such office. It does not concern your Department nor this Department.

Very respectfully,

JOHN K. RICHARDS,
Solicitor-General.

Approved.

JOHN W. GRIGGS.

ARMY—PROMOTIONS—ENLISTED MEN.

Subsequent to the examination of a candidate for promotion to a second lieutenancy in the Army under the act of July 30, 1892, and the awarding to him of a certificate of eligibility, he was subjected to a medical examination which developed the fact that he was suffering from a constitutional disease. There was nothing to show that the disease was not curable or that it permanently disabled the applicant for military service, while from subsequent reports it did appear that he was only temporarily disabled. *Held*, in the absence of a definite finding or ascertainment of fact that the candidate was physically disabled or disqualified to perform military service, he was entitled to all the benefits arising from such a certificate of eligibility.

Semle, although a soldier is primarily entitled to promotion by reason of a certificate of eligibility, if he is in fact disqualified to perform military service by reason of physical disability, this would operate to disbar him.

DEPARTMENT OF JUSTICE,
June 16, 1898.

SIR: I have the honor to acknowledge receipt of a letter addressed to the War Department by A. Dallas Sydenham, late sergeant in Company B, First United States Infantry,

claiming the right to be appointed to the position of second lieutenant in the Army under the provisions of the act of July 30, 1892. The letter is referred to me by you with the request indorsed thereon for an opinion on the question presented, and you invite my attention to the views of the Judge-Advocate General of the Army, also indorsed upon Sydenham's letter.

The facts in this case are as follows:

Sydenham enlisted in the Army as a private soldier at the age of 22 years and 9 months, on the 13th day of August, 1891, for the term of five years. On the 2d day of August, 1892, he was made a corporal, and on the 2d day of August, 1893, raised to sergeant. On the 2d and 9th days of September, 1895, the board of examiners, under the provisions of the act of July 30, 1892, met, and Sydenham was examined by said board, passed the final examination on the last-named date, and on the 31st of October, 1895, was awarded a certificate of eligibility by the board.

If there were not other facts to enter into the consideration of this case, it would come within the scope of the opinion recently rendered you in the cases of James V. Heidt and John Robertson. But the opinion of the Judge-Advocate-General, indorsed upon Sydenham's application, directs my attention to another matter, and that is as to the effect of the action of a board of medical examiners, with reference to Sydenham's physical condition, which was had after he was awarded the certificate of eligibility and before the expiration of his term of service in the Army.

The facts in regard to this examination, as I gather them from the papers on file inclosed by you to me, are as follows:

On the 22d of January, 1896, Brigadier-General Forsyth, commanding the Department of California, with headquarters at San Francisco, issued a special order as follows:

"A board of medical officers is appointed to meet at 11 o'clock a. m. on Friday, the 24th instant, or as soon thereafter as practicable, at Angel Island, California, for the purpose of examining Candidate Sergeant *Atwood D. Sydenham*, Company B, First Infantry, and reporting the nature of the disease for which he is now under medical treatment."

The detail for this board consisted of three army surgeons, whose names appear among the papers. The report of the board, made after a second examination on January 30, 1896, with a copy of the above order attached, is on file, and from it I find that, in the opinion of the surgeons, Sydenham was suffering from a constitutional disease evidenced by certain symptoms detailed in the report. Nothing is said in the report as to whether the disease was curable or whether it had the effect to permanently disable Sydenham for military service. On the other hand, events occurring subsequent to the examination and report of the surgeons tend to show that the soldier was only temporarily disabled to do military duty. At the time of the examination and report Sydenham was undergoing treatment in the hospital at Angel Island. On March 7, 1896, following the report, the surgeon at Angel Island hospital states that under treatment the condition of Sydenham has steadily improved, and although not cured he could return to duty at any time. On the 5th of April, 1896, Sydenham returned to duty with his company at Benicia Barracks, and on July 9, 1896, the surgeon at Benicia Barracks reports him as much improved. Sydenham continued to do active duty with his company from April 5, 1896, to August 12, 1896, and on the latter date, his term of service having expired, he received an honorable discharge, on which I find the following certifications:

“Character: Excellent. (No objection to his being reenlisted known to exist.) Recommendations: Temperate and a very capable noncommissioned officer. Physical condition when discharged: *Good*. Remarks: Service honest and faithful.

In the opinion of the Judge-Advocate-General, to which you direct my attention, I find the following:

“The officers of the Medical Department of the Army in their diagnosis of and report on this case were acting within the scope of their established powers and duties, and it was entirely legal and according to usage for the Secretary of War to be governed by their professional conclusions. When, after an enlisted man has passed his final examination for appointment, he becomes physically disqualified for it, or an already existing disqualification is discovered or reported, the Secretary of War may, in my opinion (and I

think it would be his duty), cause him to be passed over. To give a construction to the legislation which would necessitate the appointment of persons who might be entirely physically incapacitated would not be reasonable."

From this extract it will be readily seen that the opinion of the Judge-Advocate-General, adverse to Sydenham, was based upon the assumption that the medical board had found as a fact that Sydenham was physically disabled to perform military service. We have only to refer to the report of the board of surgeons to ascertain that this assumption is not well founded. The report is to the effect that the examining surgeons are of the opinion that Sydenham was at the time suffering from a constitutional disease, but the surgeons do not find this as a fact; nor do they say that, in case they were absolutely certain that he was afflicted with the disease indicated, it physically disqualified him to perform military service. As it is, the weight of evidence is favorable to the conclusion that Sydenham is physically able to perform military duty.

Therefore, it is my opinion that there has been no definite or conclusive finding or ascertainment of fact that Sydenham was physically disabled or disqualified to perform military service such as to deprive him of the benefits to which he was entitled under the certificate of eligibility awarded to him under the provisions of the act of July 30, 1892.

However, I do not think that the law contemplates the commissioning of men who are physically disabled as officers in the Army, and, although Sydenham is primarily entitled to promotion by reason of the certificate of eligibility which he holds, yet, if he is in *fact* disqualified to perform military service by reason of physical disability, this would seem to disbar him. I would advise, therefore, that the question as to Sydenham's physical condition may be finally determined by an examination now to be had by a legally constituted army medical board, and if, upon such examination, he is found to be physically disqualified to perform military service, his appointment as second lieutenant should be withheld.

Very respectfully,

JOHN W. GRIGGS.

The SECRETARY OF WAR.

ARMY OFFICERS—PAY.

The phrase "troops operating against an enemy" as used in section 7 of the act of April 26, 1898, was intended to apply to all instances where the troops of the United States are assembled into separate bodies, such as regiments, brigades, divisions, or corps, for the purpose of carrying on and bringing to a conclusion the war with Spain.

If the operations of the troops are with the direct object of assisting in the military measures of the Government for subduing the forces of Spain, they can, within the reasonable intendment of this act, be considered as operating against an enemy, although such operations may not be direct and are in the nature of necessary component steps, though remote, in one great military objective.

Any troops assembled at camps in the United States for the present war purposes can properly be considered as operating against an enemy, although their present service is confined to the ordinary routine of camp life.

DEPARTMENT OF JUSTICE,

June 17, 1898.

SIR: I have the honor to acknowledge the receipt of your communication of June 8, referring to me the letter of Paymaster-General Stanton requesting my opinion as to the proper construction of one of the provisions of section 7 of the act entitled "An act for the better organization of the line of the Army of the United States," approved April 26, 1898.

The clause referred to upon which an opinion is desired is as follows:

"That in time of war, every officer serving with troops operating against an enemy, who shall exercise under assignment in orders, issued by competent authority, a command above that pertaining to his grade, shall be entitled to receive the pay and allowances appropriate to the command so exercised."

The particular point upon which you desire instruction is the proper meaning of the phrase "troops operating against an enemy."

The act by its expressed terms is made applicable only in time of war. At the date of the passage of the act this country was actually at war with Spain, and by act of Congress approved April 25, 1898, it was so declared. By act

of April 22, 1898, Congress had authorized the President to raise a volunteer army, and pursuant to the terms of said last-mentioned act he had, by proclamation, called for 100,000 volunteers to serve in the Army of the United States. The clear purpose of the President and of Congress, as evidenced by this legislation and subsequent proceedings, was to form the volunteers, in connection with the regular troops, into an army of the United States for service in the war against Spain. Under this establishment it frequently happens that officers of the Regular Army are assigned to commands above those pertaining to their rank in the regular service. The object of the clause under consideration is undoubtedly to give to officers so serving just and proper pay commensurate with the rank in which they are actually serving in the war forces, instead of the smaller pay allowed to them by law according to their commissions in the regular service in time of peace. It is to be not thought, therefore, that Congress in using the language under consideration intended to make its application less extensive than the general purpose which I have stated.

It would be unjust to interpret the phrase "every officer serving with troops operating against an enemy" as applicable only to operations in the immediate presence or even the near neighborhood of an enemy. It would be equally unjust to restrict its meaning to the operations of an actual campaign, even though the movements of the troops to points of rendezvous before embarkation for hostile territory were counted as properly a part of campaign movements, which unquestionably they are.

I think the clause in question was intended to apply to all instances where the troops of the United States are assembled into separate bodies, such as regiments, brigades, divisions, or corps, for the purpose of carrying on and bringing to a conclusion the war with Spain. If the operations of the troops are with the direct object of assisting in the military measures of the Government for subduing the forces of Spain, they can, within the reasonable intendment of this act, be considered as operating against an enemy, although such operations may not be direct but are in the nature of

necessary component steps, though remote, in one great military objective.

It is not possible to define in advance the exact boundary line to be observed in every instance that may arise. I can only point out in a general way the scope of the provision in question and the principles that ought to govern the War Department in applying it. I deem it proper, however, to refer to a portion of the letter of Paymaster-General Stanton in order to indicate my opinion with reference to the views therein suggested by him.

The Paymaster-General says:

"As yet, although war has been declared to exist between Spain and the United States, there are, in my opinion, with the exception of the troops embarked for the Philippine Islands, no troops, 'operating against an enemy.'

"There is, within our borders, no enemy, within the meaning of the law, for troops to operate against. An army has been called together, and is being drilled, disciplined, and prepared to operate against an enemy, but until that army embarks for a foreign country, or until an enemy appears on our shores, and the army confronts it, it is held that no officer can receive the pay of a higher grade by virtue of anything in the act referred to. Furthermore, it is held that if a portion of an army embark, an officer remaining in this country, discharging the duties of a department commander in preserving the public order within the limits of a command above that of his grade, to which he has been assigned, is not 'operating against an enemy,' within the meaning of the law; nor is an officer of an inferior grade, who, by reason of the appointment of his superior to a higher grade in the volunteer service, who is operating against an enemy, entitled to the pay of the higher grade unless he be, himself, serving with troops so operating."

If the principles I have above laid down as governing the construction of this law are sound, then it is immaterial whether or not there is within our borders any enemy to operate against. There is an enemy, and whatever military operations are carried on, whether in the United States, or in Cuba, or in the Philippine Islands, or upon the high seas,

designed as a part of the war measures against Spain, are operations against the enemy. The Army of the United States is just as truly operating against an enemy when en route to a rendezvous, such as Camp Alger, near Washington, or at Tampa, in Florida, as when embarked on transports for a campaign in Cuba. It would be very difficult to make up the pay rolls if it were held that one rate of compensation is due to officers when the enemy confronts them in the field, and a less rate from the very moment that a hostile army has disappeared from their front. The rate of pay upon such a construction as that would differ from day to day. I think, also, that while assembled at camps in the United States such as I have named, any troops of the Army assembled for the present war purposes can properly be considered as operating against an enemy, although their present service is confined to the ordinary routine of camp life, drill, discipline, and other preparation. The assembling of such troops, their drilling, disciplining, and equipment, while assembled into military bodies, are all a part of the same general war purpose.

I need hardly observe that all service in the Army at the present time is not to be considered as operation against an enemy. Troops and their officers on the Western frontiers, performing the same service as garrisons which is requisite in time of peace, and in no wise considered a part of the army assembled to carry on the war with Spain, would not be within the meaning of the act.

Very respectfully,

JOHN W. GRIGGS.

The SECRETARY OF WAR.

CONTRACTS—DUTIES.

The discretion committed to the Secretary of War with reference to the admission of certain materials free of duty by paragraph 4 of the act of June 6, 1896 (2 Supp. Rev. Stat., 506), is sufficiently broad to embrace and assume such purchases abroad made by contractors as appear to him to be proper.

The question as to what course should be pursued by an Executive Department involves matter of fact upon which the Attorney-General may not have knowledge, and considerations of expediency upon which it is not for him to pass judgment. (21 Opin., 74, followed.)

In the case of a contract entered into by correspondence, the whole of it must be considered and both parties must assent to a provision or condition before either is bound.

When a writing upon its face is couched in terms importing a complete legal engagement, without any uncertainty as to its object or extent, it will be conclusively presumed that the whole engagement was reduced to writing.

While it has been held generally under the statutes applicable to contracts of the Post-Office Department that proposals duly accepted without formal agreement may constitute a contract complete and binding on the Government, this is not the case with contracts for public works and other contracts under section 3477, Revised Statutes.

The contract for the construction of gun emplacements on Tybee Island, Georgia, is a formal written contract, and as such merges all previous negotiations and is presumed to express without any uncertainty the final understanding of the parties, and antecedent conversations of previous or contemporary oral agreements regarding it are strictly inadmissible.

Where a contract is duly executed and approved, and the advertisements and specifications are in terms made a part thereof, as in this case, these papers constitute the contract and resort can not be had *aliunde*. If the proposal as accepted is not attached and made a part thereof in fact, it ought at least, in order to be regarded, be identified and included by appropriate reference.

A parol agreement, while a contract is executory, is not obligatory on the Government.

DEPARTMENT OF JUSTICE,

June 28, 1898.

SIR: I have the honor to acknowledge the receipt of your communication of June 9, in which you state the facts relative to a certain contract entered into with Capt. O. M. Carter, Corps of Engineers, by the Venable Construction Company for the construction of gun emplacements on Tybee Island, Georgia, and with which you inclose the contract in question and the correspondence in connection therewith, with special reference to the claim or request of the said construction company that the duty paid by it on certain foreign Portland cement imported and used to build the gun emplacements be refunded under the provisions of the act of June 6, 1896, paragraph 4 (2 Supp., Rev. Stat., 506); and you request my opinion as to the justness of the claim of the Venable Construction Company under the facts stated and the documents submitted.

The act aforesaid provides:

“That all material purchased under the foregoing provisions of this act shall be of American manufacture, except in cases when, in the judgment of the Secretary of War, it is to the manifest interest of the United States to make purchases in limited quantities abroad, which material shall be admitted free of duty.”

It is to be understood generally as to this provision that the excepted cases permit purchase abroad in limited quantities only, and only when, in the judgment of the Secretary of War, it is to the manifest interest of the United States; and the language of this act and of other similar recent enactments seems to contemplate such purchases of material, to be used in connection with contracts for public works, and like purchases not connected with contracts, by the United States, rather than by the contractors employed. However this may be, it should doubtless be conceded that the discretion committed to you is broad enough to embrace and assume as for or by the United States such purchases abroad made by contractors in cases appearing to you to be proper, one test of propriety consisting (it may be suggested) in the specification and formal inclusion of the foreign material as duty free in the contract, or an application to that end by the contractors antecedent rather than subsequent to the date of the contract or of the importation or of the work done. Furthermore, it appears to involve the definite question of fact (to be further referred to below) whether or not the proposals herein specified the use of foreign Portland cement; and suggests “the course to be pursued by your Department * * * [and] may involve matters of fact of which I have no knowledge, and considerations of expediency upon which it is not for me to pass judgment.” (21 Opin., 74.)

I may, however, point out certain facts which are patent on the face of the papers, and which may aid you in your reconsideration and determination of this case, if you conclude to undertake a reconsideration.

It appears from the original letter of Captain Carter, dated April 24, 1897, that the first information received by him that the foreign Hemmoor cement had been ordered by

the construction company was contained in the company's letter to him dated April 23, in which they notified him that the cement had been shipped, would probably arrive about the 10th of May following, and had been selected because the construction company understood that German cement was preferred by the Government engineers. Captain Carter does not intimate that any indication of preference for this cement had been given by the Government officers, or that any previous request for its free importation had been made by them or by the construction company, and he merely states that he sees no objection to the use of the cement in question, provided it fulfills all the necessary conditions.

In the advertisement, specifications, and proposal leading up to the contract of the construction company as approved by the Secretary of War and submitted to me, while there are printed conditions requiring the prices to be for material in place, and to include the cost of all material of every description entering into the construction, and requiring the use of Portland cement as well as natural cement, and the preparation of different grades of concrete, composed of various proportions of Portland and natural cement, there are no provisions which appear to contemplate any variation from these requirements, nor in particular the use of foreign Portland cement, nor the exemption from duty of any material used. The proposal attached to the said contract is a blank form only, and is not filled out with any words or figures to adapt it to the particular contract before us; but this is the document with its various parts as actually combined and executed, from which the agreement of the parties is to be deduced, and the general rule of law is that it is not permissible to import into a contract from oral understandings or separate documents provisions which are contradictory of or additions¹ to the terms expressed. Upon this state of the papers it appears that your declination aforesaid concurring in the views of the Chief of Engineers was based, and that the Chief of Engineers in expressing his view that in ordering the cement from abroad without first having submitted the question to the Secretary of War or notifying the engineer in charge the construction company took a course for which it alone is responsible, calls attention to the

fact that in its proposal for the work the company made no reference to using foreign cement, nor did it intimate that it expected articles which it intended to import to be admitted free of duty.

It is now stated, however, from the letter addressed to the Chief of Engineers by Capt. Cassius E. Gillette, dated Savannah, May 23, 1898, that the proposal of the Venable Construction Company, which was accepted by the War Department, contained, as matter of fact, upon the second page thereof, the clause, "Foreign, Portland, and domestic Rosendale to be used," and that the company, before the date of importation of the cement, asked Captain Carter to request you to admit the said cement free of duty, and that Captain Carter advised the company that upon specific application, giving the brand and quantity of cement and other necessary information, he would forward the matter to the Secretary of War for action; and it is further stated that the officers of the construction company understood that Captain Carter expressed a preference and desire to have all Portland cement used in the work to be of German manufacture, which would be free of duty; and that Assistant Engineer Gieseler, while not knowing what the bidders were given to understand by Captain Carter previous to the bidding, has the impression that nothing but imported cement was ever thought of by either Captain Carter or himself in connection with the work, particularly because he does not know of any Portland cement of American manufacture that is authoritatively accredited to compare in essential qualities with the German Portland, from which facts and the others heretofore referred to it appears to Captain Gillette that bidders were given to understand that foreign Portland cements were wanted, and that the bidder having specified such cement and entered into a contract in good faith involving the furnishing of the same, and in view of its actual use in the construction of the works, it would be unfair to the contractor to secure the benefits gained by the use of foreign cement without allowing him free entry, as appears to be provided by law.

It will be necessary at this point to consider the law upon the subject and the general statutory provisions applicable

to public contracts and determinations of my predecessors and the courts thereon.

Section 3744 of the Revised Statutes makes it the duty of the Secretary of War to require every contract made by him or by officers under him to be reduced to writing and signed by the parties at the end thereof, a copy of which must be filed in the proper office, together with all bids, offers, and proposals, and with a copy of the advertisement inviting bids; and by section 3745 it is the duty of the officer, in making return, to take an oath that the copy is an exact copy of the contract made, and that the accompanying papers include all those relating to the contract.

The contract before us is not a contract entered into by correspondence, in which case, however, the whole correspondence must be considered, and both parties must assent to a provision or condition before either is bound (*United States v. Bostwick*, 94 U. S., 53, 65; *Lovett v. United States*, 12 Ct. Cls., 67, 82); but it is a formal written contract which merges all previous negotiations, and is presumed to express without any uncertainty the final understanding of the parties, and antecedent conversations or previous or contemporary oral agreements regarding it are strictly inadmissible. (*Branoley v. United States*, 96 U. S., 168, 173-174; *De Witt v. Berry*, 134 U. S., 306; *Johnson v. St. Louis, etc., Ry.*, 141 U. S., 602; *Culver v. Wilkinson*, 145 U. S. 205.) And although parol evidence is admissible to show the facts and circumstances amid which a contract was made, when necessary to explain its meaning or application (*Bradley v. Steam Packet Co.*, 13 Peters, 89; *Peck's Case*, 14 Ct. Cls., 84), the rule just stated would also exclude antecedent correspondence when not in terms, by reference, or by effect, made part of the subsequent instrument. The general rule is therefore to be applied, viz: When the writing itself, upon its face, is couched in terms importing a complete legal engagement, without any uncertainty as to its object or extent, it will be conclusively presumed that the whole engagement was reduced to writing. (*Seitz v. Brewers' Refrigerating Co.*, 141 U. S., 510, 517, citing *Greenleaf on Evidence*, sec. 275.)

Now, section 3744 is a statute of frauds more stringent

and restricted than the English statute and others based upon it, in that part performance does not take a case out of the statute (*Jones v. United States*, 11 Ct. Cls., 733; *South Boston Iron Co. Case*, 18 Ct. Cls., 165; affirmed S. C., 118 U. S., 37; *Barnes et al. v. District of Columbia*, 22 Ct. Cls., 366), and its provisions are mandatory and not directory. (*Clarke v. United States*, 95 U. S., 539; *Neuchatel Company's Case*, 17 Ct. Cls., 386; *Steele v. U. S.*, 19 Ct. Cls., 181.) Furthermore, under the circumstances of this case, and with regard to the pending question, the contract is to be considered as still executory, and therefore as not taken out of the statute because executed. And the Jones case *supra* and other cases cited are authority for the proposition that a subsequent verbal agreement may not alter a contract under section 3744.

While it has been held generally, under the statutes and regulations applicable to contracts of the Post-Office Department, that proposals duly accepted, without formal agreement, may constitute a contract complete and binding on the Government (15 Op., 226; 17 Op., 70; 20 Op., 293; *Schneider v. United States*, 19 Ct. Cls., 547, and authorities cited p. 552), this is not the case with contracts for public works and other contracts under section 3744. (So. Boston Iron Co. Case, *supra*; 20 Op., 445; *Id.*, 496; and see 19 Op., 269.) As to such contracts the following language is instructive:

"Congress inserted these words ['signed with their names at the end thereof'] for a purpose, and courts must give them effect. * * * These additional words can not mean less than that the contract shall be so full and complete before signing that it can be signed in whole by both parties. It excludes the idea that one party may sign one part of the contract and the other party another, and leave the courts to arrange a contract by collecting and joining the pieces." (*South Boston Iron Co. Case*, 18 Ct. Cls., p. 177.)

This contract is, as matter of fact, a complete written contract, and it may be added that a parol agreement while the contract is executory is not obligatory on the Government (*Wilson & Goss v. United States*, 23 Ct. Cls., 77); that where there is a variation (as to a release) between an oral and written understanding, the latter must be considered to

be drawn according to the actual agreement (*Walsh v. United States*, 21 Ct. Cls., 268); and that a contract can not be changed or modified by the protest of one party (*Railway Company v. United States*, 28 Ct. Cls., 379). Nor does this case involve the reasonableness or propriety of a modification actually made under a clause in a contract providing for that contingency, such as was allowed without a new advertisement by 21 Opinion, 207.

Consequently, where a contract is duly executed and approved, and the advertisement and specifications are in terms, as here, made part thereof, these papers constitute the contract, and we are not permitted to look outside them, and if the proposal as accepted is not attached and made part thereof in fact, it ought, at least, in order to be regarded, to be identified and included by appropriate reference. This leaves, however, for your determination as a question of fact and a part of the case the query whether the uniform or usual administrative practice of your Department views the proposal in such case and its formal acceptance by the Government as an integral portion of the agreement as executed, indicated by the filing of those papers on that theory in the proper returns office, and whether there was in this case such a proposal, duly accepted, and viewed and filed accordingly. Nothing in the foregoing review of the law would in that event (in my opinion) prevent your giving due weight to the circumstance.

Finally, in view of the foregoing résumé, it appears to me that there is no legal reason why you should not reconsider the case, and, without suggesting the proper course for your administrative judgment to take, or the proper conclusion for you to reach, it would seem to me to be right to inquire what provisions, if any, the proposal (if properly to be considered as part of the contract, as just indicated) contained, as matter of fact, in reference to the use of foreign Portland cement, and what, if anything, passed upon the subject between the representatives of the construction company and the officers of the Corps of Engineers, acting on behalf of the Government, anterior to the date of Captain Carter's letter to the Chief of Engineers, dated April 24, 1897, which might properly influence or control your views of the merit

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or justness of the claim in question. In this connection I may call your attention to the reference in the contract itself to "proposal dated November 13, 1896." I return the papers in the case herewith.

Very respectfully,

JOHN W. GRIGGS.

The SECRETARY OF WAR.

CONTAGIOUS DISEASES—STATUTORY CONSTRUCTION.

If the President is satisfied that cholera, yellow fever, smallpox, or plague exists in this country, and that it is necessary, in order to prevent its spread, to adopt and enforce certain rules and regulations, he has authority to do so under the act of March 27, 1890, notwithstanding the provisions of the act of February 15, 1893.

A general act is not to be construed to repeal a previous particular act, unless there is some express reference to the previous legislation on the subject, or unless there is a necessary inconsistency in the two acts standing together.

DEPARTMENT OF JUSTICE,

July 11, 1898.

SIR: In your communication of the 15th ultimo you inclose a letter from the Supervising Surgeon-General of the Marine-Hospital Service, in which attention is invited to the provisions of the act of March 27, 1890, entitled "An act to prevent the introduction of contagious diseases from one State to another, and for the punishment of certain offenses," and also of the act of February 15, 1893, entitled "An act granting additional quarantine powers and imposing additional duties upon the Marine-Hospital Service," and you request my opinion upon the question whether the act of 1890 is still in force so that regulations can be made and enforced under it.

Although it does not clearly appear in the letter of the Surgeon-General that the question of adopting and enforcing regulations under the law of 1890 is pending in your Department, yet assuming that this is true and that the question which you propound has properly arisen in the administration of your Department, I am disposed to hold, after a careful consideration of the provisions of these two acts, that the general provisions of the act of 1893 do not repeal or supersede the special provisions of the act of 1890.

The act of 1893 does not expressly repeal the act of 1890. The general doctrine on the subject of repeal by implication is thus stated in *Ex parte Crow Dog* (109 U. S., 556, 570):

“‘The general principle to be applied,’ said Bovill, C. J., in *Thorpe v. Adams* (L. R., 6; C. P., 135), ‘to the construction of acts of Parliament is that a general act is not to be construed to repeal a previous particular act, unless there is some express reference to the previous legislation on the subject, or unless there is a necessary inconsistency in the two acts standing together.’ ‘And the reason is,’ said Wood, V. C., in *Fitzgerald v. Champenys* (30 L. J. N. S. Eq., 782; 2 Johns. & Hem., 31-54), ‘that the legislature, having had its attention directed to a special subject, and having observed all the circumstances of the case and provided for them, does not intend by a general enactment afterwards to derogate from its own act when it makes no special mention of its intention so to do.’”

The third section of the act of 1893 directs the Supervising Surgeon-General of the Marine-Hospital Service to examine the quarantine regulations of all State and municipal boards of health and, under the direction of the Secretary of the Treasury, to cooperate with and aid State and municipal boards of health in the execution and enforcement of their rules and regulations, and those made by the Secretary of the Treasury, to prevent the introduction of contagious or infectious diseases into the United States from foreign countries and into one State or Territory or the District of Columbia from another State or Territory or the District of Columbia. All rules and regulations made by the Secretary shall operate uniformly, not discriminating against any port or place. At ports and places where there are no State or municipal regulations sufficient to prevent the introduction or spread of contagious or infectious diseases the Secretary of the Treasury is authorized to make such additional rules and regulations as may be necessary. Such rules and regulations shall be promulgated by the Secretary and enforced by the State and municipal authorities where they will undertake to do so; but if they fail or refuse to do so the President shall enforce them, and adopt

such measures as in his judgment shall be necessary to prevent the introduction or spread of such diseases, and may detail or appoint officers for that purpose.

It will be observed that these provisions of the act of 1893 under which the Federal authorities cooperate with the State and municipal authorities, and only adopt and execute their own regulations where the State or municipal authorities fail or refuse to act, are general in their nature, applying to all contagious and infectious diseases, and designed to prevent their introduction as well as their spread.

On the other hand the act of 1890 is special in its provisions. It authorizes the President to act without reference to State or municipal authorities in a certain contingency, namely, whenever it shall be made to appear to his satisfaction that "cholera, yellow fever, smallpox, or plague exists in any State or Territory or in the District of Columbia, and that there is danger of the spread of such disease into other States, Territories, or the District of Columbia." In such emergency summary power is given the President "to cause the Secretary of the Treasury to promulgate such rules and regulations as in his judgment may be necessary to prevent the spread of such disease from one State or Territory into another, or from any State or Territory into the District of Columbia, or from the District of Columbia into any State or Territory, and to employ such inspectors and other persons as may be necessary to execute such regulations to prevent the spread of such disease."

It therefore appears to me that in the event the President is satisfied that cholera, yellow fever, smallpox, or plague exists in this country, and that it is necessary in order to prevent its spread to adopt and enforce certain rules and regulations, he still has authority, under the act of 1890, to do so.

Respectfully,

JOHN K. RICHARDS,
Solicitor-General.

Approved.

JOHN W. GRIGGS.

THE SECRETARY OF THE TREASURY.

VOLUNTEER OFFICERS—APPOINTMENTS.

Vacancies of regimental and company officers occurring in the organizations from the several States and Territories after their muster into the Volunteer Army of the United States, under the act of April 22, 1898, should be filled on commissions issued by the governor of the States or Territories to which the organizations belong.

DEPARTMENT OF JUSTICE,

July 13, 1898.

SIR: I have the honor to acknowledge the receipt of your communication of July 7, submitting for my opinion certain provisions of the act of Congress, approved April 22, 1898, entitled "An act to provide for temporarily increasing the military establishment of the United States in time of war, and for other purposes." You state that said act provides that each regiment of the Volunteer Army called into the United States service from the several States

"shall have one surgeon, two assistant surgeons, and one chaplain, and that all the regimental and company officers shall be appointed by the governors of the States in which their respective organizations are raised;" and also that when certain organizations of the militia of any State specified in the act

"shall enlist in the Volunteer Army in a body, as such, the officers in service with the militia organization thus enlisted may be appointed by the governors of the States and Territories, and shall, when so appointed, be officers of corresponding grades in the same organization when it shall have been received into the service of the United States as a part of the volunteer army."

You further state that your Department has held that under this law all the regimental and company officers provided for in the act should be commissioned by the governors of the several States and Territories, not only in respect to those appointed upon the original formation and muster into the United States service of such organizations, but to subsequent appointments to fill vacancies happening therein by casualties, resignations, promotions, etc.

The correctness of this interpretation of the law by your Department having been questioned, my opinion is asked as

to whether vacancies of commissioned officers occurring in these volunteer organizations, after their muster into the United States service, should be filled by persons commissioned by the governors of the States and Territories to which the organizations may belong, or whether such vacancies should be filled by persons commissioned by the President of the United States.

In my opinion the view of the law taken by your Department upon this subject is correct. Nowhere in the act of Congress referred to is any language used indicating that any distinction whatever in the method of the appointment of commissioned officers is to be made between those first appointed and commissioned and those who may be subsequently appointed to fill vacancies happening after the muster of the regiment into the service of the United States. The act plainly says that all the regimental and company officers shall be appointed by the governors of the States in which their respective organizations are raised. This language is as efficient to include appointments to fill vacancies as appointments for the original organization of the regiment. No reason is suggested for the application of a different rule, nor does any occur to me. There appears to be a very clear purpose running through the whole act to allow regiments of the Volunteer Army to be contributed by the respective States *en masse* and when so contributed they are credited to the quota of the States designated under the call of the President for volunteers, and while upon being mustered in they become subject to the military laws of the United States, they retain the name of the State by which they were contributed, and are supposed to bear a direct and special relation to such State to an extent which justifies, in the opinion of Congress, the appointment of the commissioned officers by the governor.

Very respectfully,

JOHN W. GRIGGS.

The SECRETARY OF WAR.

DRAWBACK—IMPORTED LEAD.

The drawback under section 25 of the act of October 1, 1890, is measured by the duties paid on the imported materials used in the manufacture of the exported articles and not by the imported materials found in such articles.

The proviso of this section requires only that the imported materials "shall so appear in the completed articles that the quantity or measure thereof may be ascertained."

It does not prescribe how they shall appear, except that they shall so appear that the quantity and measure thereof may be ascertained.

Ascertainment of quantity and measure is an act of the mind, and the required appearance is therefore not a visual, but a mental presentation.

In order that there may be a recovery of drawback under this proviso, where the article exported is made in part from domestic materials, the imported materials shall so appear in the completed article—that is, be shown to the satisfaction of the customs officers to exist in the completed article—that the quantity or measure thereof may be ascertained.

Satisfactory proof having been presented to the customs officers that a certain amount of imported lead had been used in the manufacture of pig lead, an inspection or analysis of the pig lead must show that the imported lead, after allowing for wastage, is present in the pig lead to be exported, on which drawback is claimed.

All the facts necessary having been established to identify the imported materials used, to ascertain the quantity thereof, and to compute the duties paid thereon, and it being satisfactorily shown that the imported materials so appear in the exported product that the quantity or measure thereof may be ascertained, a drawback is allowable.

DEPARTMENT OF JUSTICE,

July 13, 1898.

SIR: You have submitted to this Department a claim of The Consolidated Kansas City Smelting and Refining Company for drawback on certain exportations of imported lead, smelted, refined, and exported in the years 1893 and 1894, and request my opinion upon the question whether such drawback may be legally allowed. The determination of this question demands a reconsideration of the opinion given by this Department on December 28, 1894 (21 Opin., 110), in which it was held that a similar claim was excluded by a proviso in section 25 of the act of October 1, 1890.

The general facts of the case are sufficiently stated in the opinion mentioned. In addition, the communication from

your Department, dated March 26, 1897, contains the following:

"Upon an examination of the records in the case, the statements contained in the affidavit made by the president of said company (The Consolidated Kansas City Smelting and Refining Company), under date of the 19th of January, 1897, are found to be accurate. This affidavit contains all the facts necessary to identify the materials used, to ascertain the quantity thereof, and to compute the duties paid thereon."

The proviso of section 25 of the McKinley Act, which was held sufficient to exclude this claim, reads:

"Provided, That when the articles exported are made in part from domestic materials, the imported materials, or the parts of the articles made from such materials, shall so appear in the completed articles that the quantity or measure thereof may be ascertained."

After calling attention to this proviso, it is stated in the opinion of December 28, 1894, that the Secretary of the Treasury assumes "that the proviso forbids the allowance of a drawback except in cases where the article manufactured or produced can be so separated chemically or mechanically into its component materials that the relative proportions of each material may be ascertained without reference to past books of account;" and then, without other reason than that the section is intended, in the opinion of the writer, to apply only to cases where an article is made of two or more different materials, the alleged assumption of the Secretary is approved.

Prior to the passage of the McKinley law drawbacks were only allowed on articles "wholly manufactured of materials imported," under the provisions of the Revised Statutes, section 3019, which reads as follows:

"There shall be allowed on all articles wholly manufactured of materials imported, on which duties have been paid when exported, a drawback equal in amount to the duty paid on such materials, and no more, to be ascertained under such regulations as shall be prescribed by the Secretary of the Treasury. Ten per centum on the amount of all drawbacks so allowed shall, however, be retained for the use of the United States by the collectors paying such drawbacks respectively."

The purpose of this provision for drawback is well stated by Mr. Justice Brown in the recent opinion in *Tidewater Oil Company v. United States* (171 U. S., pp. 210, 216):

“The object of the section was evidently not only to build up an export trade, but to encourage manufactures in this country, where such manufactures are intended for exportation, by granting a rebate of duties upon the raw or prepared materials imported, and thus enabling the manufacturer to compete in foreign markets with the same articles manufactured in other countries.”

In order further to promote this policy of encouraging our home manufactures and extending our export trade, the right to drawback was, by the McKinley Act, broadened so as to include all imported materials, on which duty was paid, used in the manufacture of articles produced in this country and exported for sale abroad, whether such articles should be manufactured wholly of imported materials or partly of domestic. In view of this change, from a policy excluding domestic materials to one permitting their use, it may fairly be inferred that Congress intended to encourage the use by our manufacturers of domestic in connection with imported materials, thus promoting the home industries which produce such domestic materials. This evident object of the law should not be forgotten in construing it.

Coming now to such construction, section 25 begins with the following broad and clear provision:

“That where imported materials on which duties have been paid are used in the manufacture of articles manufactured or produced in the United States there shall be allowed on the exportation of such articles a drawback equal in amount to the duties paid on the materials used, less one per centum of such duties.”

It is to be observed that, under this provision, the drawback is measured by the duties paid on the imported materials *used* in the manufacture of the exported articles and not by the imported materials found in such article. In every process of manufacture there is a waste of material. The drawback being for the materials *used*, an allowance is made by the Government for such wastage or loss in man-

ufacture. It is obvious, therefore, that the imported materials used and the amount of the duties paid thereon can only be ascertained by a reference to the records. No separation of the completed article into its component materials, whether by chemical analysis or mechanical disintegration, will show the amount of materials used or the duties paid on such materials.

It appears to me that this fundamental fact lying at the basis of the drawback system, namely, that the duties refunded are those which have been paid upon imported materials used in the production of an article manufactured in this country and subsequently exported, is lost sight of in the opinion under consideration. The manufacturer is induced to pay the duties on imported materials by the assurance, given by the Government, that if he uses these materials in manufacturing articles for export, thus giving additional employment to capital and labor at home, and extending our export trade abroad, the duties so paid will be refunded upon proper proof of these facts being made to the customs officers.

That the drawback is not limited by the imported material found in the completed article appears further from the closing proviso in section 25, which reads:

“That the imported materials used in the manufacture or production of articles entitled to drawback of customs duties when exported shall in all cases, where drawback of duties paid on such materials is claimed, be identified, the quantity of such materials used and the amount of duties paid thereon shall be ascertained, the facts of the manufacture or production of such articles in the United States and their exportation therefrom shall be determined, and the drawback due thereon shall be paid * * * under such regulations as the Secretary of the Treasury shall prescribe.”

The proviso upon which the opinion under consideration turns requires “that when the articles exported are made in part from domestic materials the imported materials * * * shall so appear in the completed articles that the quantity or measure thereof may be ascertained.” The opinion takes it for granted that the words “shall so appear in the completed articles” refer to an appearance in tangible form, after a separation, chemical or mechanical, of the

completed article into its component materials. It takes it for granted that the quantity must be ascertained by an analysis, "without reference to past books of account." But is not this mere assumption? All the proviso requires is that the imported materials shall so appear in the completed articles that the quantity or measure thereof may be ascertained. The proviso does not prescribe in what way ascertained. It does not prescribe how they shall appear, except that they shall so appear that the quantity or measure thereof may be ascertained. The ascertainment of the quantity or measure is an act of the mind. The appearance is therefore not a visual but a mental presentation. The words "appear" and "appearing" are well known to legal phraseology. The fact is required to appear, or be made to appear, not to the eye, but to the mind.

"The word 'appear' or 'appearing' is one of frequent use in judicial proceedings (and is sometimes used in statutes referring to them) as meaning clear to the comprehension when applied to matters of opinion or reason, and satisfactorily or legally known or made known when used in reference to facts or evidence." (*Gorham v. Lockett*, 6 B. Monroe, 146, 165.)

The meaning of this proviso, therefore, is, that where the article exported is made in part from domestic materials the imported materials shall so appear in the completed article—that is, be shown to the satisfaction of the customs officers to exist in the completed article—that the quantity or measure thereof may be ascertained.

What material is domestic and what imported can only appear or be shown to the customs officers by a reference to the records, or by an inspection of the process of manufacture. In the present case it is conceded that the imported materials used have been identified and distinguished from the domestic materials used. Taking these facts, together with the allowance for wastage regularly made by your Department, and the lead derived from the imported ore does so appear in the exported pig lead that the quantity or measure thereof may be ascertained. The proviso only deals with the ascertainment of the quantity or measure of the imported material existing in the completed article. It has nothing to do with the *identification* of the imported

materials. The imported materials used in manufacturing articles must be identified by extrinsic evidence. After the imported materials have been identified, then the proviso simply requires that such imported materials thus identified must so appear in the completed article that the quantity or measure thereof can be ascertained. The nature of the appearance, the sufficiency of the proof to be presented in order to comply with the requirements of the proviso, is of course for the customs officers to determine.

In the opinion under consideration it was held that under the proviso in question the imported materials must be capable of identification by an analysis; that is, that the imported material must be of a distinct kind, so that the disintegration of the article would distinguish the imported from the domestic material. The identification of the imported materials is, however, covered by the concluding proviso of the section, which requires "that the imported materials used * * * shall in all cases where drawback of duties paid on such materials is claimed, be identified, etc." The imported materials used having been identified by documentary evidence under this proviso, the first proviso simply requires that such imported materials thus used shall so appear in the completed article that the quantity or measure thereof may be ascertained. In other words, satisfactory proof having been presented to the customs officers that so many pounds of imported lead have been used in the manufacture of pig lead, an inspection or analysis of the pig lead must show that the imported lead, after allowing wastage, is present in the pig lead to be exported on which drawback is claimed. This serves as a check, a method for verification only.

In identifying imported materials used in manufacturing articles subsequently exported it has long been the policy of your Department to require and accept extrinsic evidence, documentary proof, verified, if necessary, by official inspection. Thus, in case of steel rails exported, the imported materials used upon which drawback is allowed, are required to "be verified by an official inspection of the company's records of manufacture" (Syn., 13937); on solder composed of lead and pig tin used in making oil cans, "the actual

quantity of the metals so used in each month shall be shown by a sworn statement of the company's superintendent" (Syn., 14273); on the "alcohol actually consumed in the preparation of the several extracts, including necessary wastage, and not of the alcohol contained in the exported fluids," "verified by reference to the formulæ" (Syn., 13641); on refined butter, made of salt, glucose, and imported grease, "the exact quantity" to be "shown in the manufacturer's statement on each export entry" (Syn., 14578); and on dynamite, "the quantity of such glycerin shall be determined by allowing 47.4 pounds of the same for each 100 pounds of nitroglycerin contained in the exported articles" (Syn., 14475).

It appears from the statement* submitted that before engaging in the business of thus smelting imported along with domestic ore, with a view to export the refined metal and claim the drawback on the imported material used therein, The Consolidated Kansas City Smelting and Refining Company submitted its proposed plan of operation to your Department. This plan was at least impliedly approved, and the company proceeded with its operations, and made large importations of lead ore from Mexico, paying considerable sums as duties thereon, upon the understanding that the amounts thus paid would be refunded on the exportation of the refined lead. Three different drawback claims arising under these circumstances were allowed and paid by the Government before the present claim accrued. It being conceded that all the facts necessary to identify the imported materials used, to ascertain the quantity thereof, and to compute the duties paid thereon have been established, and that it is satisfactorily shown in the manner heretofore indicated that the imported materials so appear in the exported product that the quantity or measure thereof may be ascertained, it is my opinion that no provision of law forbids the allowance of the drawback claimed.

Respectfully,

JOHN K. RICHARDS,
Solicitor-General.

Approved.

JOHN W. GRIGGS,
The SECRETARY OF THE TREASURY.

ALASKA—INTOXICATING LIQUORS.

The sale of liquors on board of American vessels in Alaskan waters is forbidden except upon permit obtained according to law from the customs officials.

Such sales on British vessels may be prohibited under Treasury regulations.

DEPARTMENT OF JUSTICE,

July 14, 1898.

SIR: I have the honor to acknowledge the receipt of your communication of July 7, with its inclosures, in which you raise the question whether passenger vessels sailing from the United States to Alaska can sell liquor while in Alaskan waters to passengers on board, and you request my opinion whether such sale on board these vessels is a violation of law and regulations.

Under the provisions of law and executive regulations framed thereupon, to which you refer me, it is clear that it is unlawful to import into or sell in the district of Alaska, or within its territorial waters, intoxicating liquors except for medicinal, scientific, mechanical, or sacramental purposes, and that for shipment from the United States for the permitted uses, a permit of the proper customs official must first be obtained; and that to obtain clearance for a vessel departing from the United States for the Territory of Alaska, having on board intoxicating liquors, a special manifest of the liquors must be given at the port of departure, satisfying the collector there that the said liquors are intended for the exempted purposes or are covered by bonds taken in accordance with law.

In view of these plain and comprehensive provisions, I am clearly of the opinion that the sale of liquors on board steamers while in Alaskan waters is a violation of law and regulations. I may add that the hardship to which you refer, caused by the fact that British vessels in Alaskan waters appear to enjoy the privilege of furnishing liquor to passengers, which is denied our vessels, may be removed by the adoption and enforcement of additional Treasury regulations prohibiting such sale on any vessels, and subjecting the same to the proper customs supervision and control.

In accordance with your request, I return the opinion of the Solicitor of the Treasury which you inclosed.

Very respectfully,

JOHN W. GRIGGS.

The SECRETARY OF THE TREASURY.

DRAWBACK—LEAD.

A drawback may be allowed of the duties paid on imported lead, refined, in a bonded warehouse, subsequently withdrawn therefrom on payment of duties, for domestic consumption, as provided in section 29 of the act of July 24, 1897, upon the exportation of articles manufactured wholly from such lead under the provision of section 30 of said act. Section 29 of this act, providing that the refined metal set aside each day shall be treated thereafter as imported metal, conclusively distinguishes the product of the foreign from that of the domestic ore, and identifies the lead set aside as imported lead.

DEPARTMENT OF JUSTICE,
July 14, 1898.

SIR: In your communication of October 18, 1897, with respect to the application of The Selby Smelting and Lead Company, of San Francisco, for drawback, you request my opinion whether a drawback of the duties paid on imported lead refined in a bonded establishment and subsequently withdrawn therefrom, on payment of duties, for domestic consumption, as provided in section 29 of the act of July 24, 1897, may be allowed upon the exportation of articles manufactured wholly from such lead, under the provisions of section 30 of the same act.

Section 29, regulating bonded smelters, provides that imported ores or metals in any crude form may be smelted or refined therein, without payment of duties, "together with other metals of home or foreign production." Then follows this proviso, evidently designed to meet the case of the same metal being present in the foreign and domestic ores combined in smelting:

"Provided, That each day a quantity of refined metal equal to ninety per centum of the amount of imported metal smelted or refined that day shall be set aside."

The refined metal thus set aside may be exported without

payment of duties, or withdrawn for domestic consumption, upon entry and payment of duties. The section contains a special provision with respect to lead ores, requiring the refined metal set aside to be "reexported or the regular duties paid thereon within six months from the date of the receipt of the ore."

The ore imported by the applicant was a fluxing ore, composed largely of lead, and was smelted, as the process required, along with a domestic refractory ore, containing, incidentally, a small percentage of lead. A small quantity of domestic lead therefore entered into the refined lead produced. The statute foresaw this result, and provided a method of separating the product, and distinguishing and identifying for customs purposes the lead produced from the imported ore, which, in contemplation of law, should be deemed and treated thereafter as imported metal. Accordingly, each day, under the regulations of your Department, a quantity of refined lead, equal to 90 per centum of the imported lead smelted and refined that day was set aside, to be exported without payment of duties, or withdrawn for domestic consumption, upon entry and upon payment of duties, as imported lead.

Section 30, of the same act, relating to drawbacks, provides:

"That where imported materials on which duties have been paid are used in the manufacture of articles manufactured or produced in the United States, there shall be allowed on the exportation of such articles a drawback equal in amount to the duties paid on the materials used, less one per centum of such duties: *Provided*, That when the articles exported are made in part from domestic materials, the imported materials, or the parts of the articles made from such materials, shall so appear in the completed articles that the quantity or measure thereof may be ascertained."

Relying upon this provision for drawback, The Selby Smelting and Lead Company withdrew the refined lead set aside as imported metal, and paid the duties thereon, and used it in the manufacture of articles for exportation. These articles were manufactured wholly out of this lead, and the company submits that the foregoing proviso of the draw-

back section, which was held in the Attorney-General's opinion of December 28, 1894, sufficient to forbid the allowance of a drawback in a case somewhat resembling this, does not apply, since no domestic material was used in manufacturing the articles exported.

On the other hand, some domestic lead did enter into the product of the smelter, and since a chemical analysis will not distinguish the imported from the domestic lead in the pig, it is suggested that the proviso does operate to forbid the allowance of the drawback because, under the holding of this Department in the opinion mentioned, the imported lead does not so appear in the articles exported that the quantity or measure thereof can be ascertained.

But when the Government selected and set aside a specific quantity of the refined metal, to be deemed and treated thereafter as imported metal, it conclusively distinguished the product of the foreign from that of the domestic ore, and identified the metal set aside as imported lead. From that time on, in contemplation of law, and by the action of the Government, the refined lead set aside became and was imported lead, and this lead, when withdrawn on payment of duties and used in the manufacture of articles for exportation, became and was imported material on which duties had been paid. The Government is estopped, by its own conduct, from claiming this lead to be other than the imported lead which it set aside and upon which it collected duties.

These considerations are sufficient to decide the question you submit in favor of the allowance of the claim of The Selby Smelting and Lead Company for drawback, and relieve me of the necessity of discussing the validity of the objections to its allowance, based upon the opinion of December 28, 1894. For a discussion of those objections, I have the honor to refer you to my opinion of the 13th instant, upon an analogous question.

Respectfully,

JOHN K. RICHARDS,
Solicitor-General.

Approved.

JOHN W. GRIGGS.
The SECRETARY OF THE TREASURY.

IMMIGRANTS—CONTAGIOUS DISEASES.

Alien immigrants pronounced by competent authority under the act of March 3, 1891, to be suffering from a loathsome or dangerous contagious disease are not entitled to enter the United States.

Entrance by land, as well as landing from a vessel, is forbidden by the act.

Transportation companies conducting the business of transportation, either by land or by water, are included within the term "person," as used in section 6 of this act, and are accordingly liable to the penalties prescribed therein.

The officers or servants of a corporation responsible for or actually engaged in breach of the immigration laws under the act of 1891 are liable to the penalty imposed by section 6, in addition to which the corporation itself is liable for such violations.

A corporation is liable for the acts of its officers, agents, or servants done by its authority, and for every wrong it commits, or for quasi-criminal acts, and in such case the doctrine of *ultra vires* has no application.

DEPARTMENT OF JUSTICE,

July 15, 1898.

SIR: I have the honor to acknowledge the receipt of your communication of June 8, in which you submit a copy of section 6 of the act of March 3, 1891, for my consideration and the expression of my views as to whether the repeated endeavor on the part of transportation companies to bring into the United States aliens afflicted with a disease pronounced to be "loathsome or dangerous contagious" is within the meaning of said section, so as to make such companies liable to the penalties prescribed thereby. It is fairly to be presumed, from the tenor of your request, that you have submitted a class of cases actually and constantly arising in the administration of your Department. I may therefore proceed to the consideration of the question on its merits.

"Persons suffering from a loathsome or dangerous contagious disease" are specifically mentioned in section 1 of the act of March 3, 1891 (26 Stat., 1084), among the classes of persons excluded by that act. Section 8 of the act provides for a medical examination of alien immigrants upon arrival by water within the United States for the purpose of determining their physical or mental condition and status under the act, and it is specifically provided that decisions

by the inspection officers and their assistants touching the right of any alien to land, when adverse to such right, shall be final, subject to appeal to the Superintendent of Immigration and to review by the Secretary of the Treasury. The force and consequence of this examination are extended to alien immigrants arriving by land under the provisions of section 8 and the regulations of the Secretary of the Treasury prescribed in accordance therewith. It therefore follows that alien immigrants pronounced by competent authority under the act to be suffering from a "loathsome or dangerous contagious disease" are not entitled to enter the United States, and although the language of the act specifies more frequently "transportation by vessel" as the means of admission contemplated, other provisions (e. g., section 1, "shall be excluded from admission into the United States;" section 6, "any person who shall bring into or land in the United States, by vessel or otherwise") plainly indicate that entrance by land, as well as landing from a vessel, is forbidden; and the instructions of the Treasury Department (Immigration Laws and Regulations, 1895; rule 7, Treasury Department circular No. 107, July 24, 1897; circular No. 140, Sept. 3, 1897) are couched in such terms, referring to the agency by which the alien is brought and to the frontiers at which officials are charged with the execution of the laws, as to lead to the same conclusion.

Section 6 of the said act provides "that any person who shall bring into or land in the United States, by vessel or otherwise, or who shall aid to bring into or land in the United States, by vessel or otherwise, any alien not lawfully entitled to enter the United States shall be deemed guilty of a misdemeanor, and shall on conviction be punished by a fine not exceeding one thousand dollars, or by imprisonment for a term not exceeding one year, or by both such fine and imprisonment."

The question, therefore, is whether a transportation company conducting the business of transportation either by land or water is included within the term "person" as used in section 6 of the act in question, so as to make such a company liable to the penalties prescribed thereby.

Section 4 of the act forbids "a steamship or transportation

company or owners of vessels to solicit immigration, except by ordinary advertisement," and previous cognate acts specify, relative to violations of the respective provisions, the "owners, master, or consignees," "person, partnership, company, or corporation," for whose acts or defaults the vessel is liable to forfeiture. (Sec. 5, act of Mar. 3, 1875, 18 Stat., 477; secs. 3 and 4, act of Feb. 24, 1885, 23 Stat., 322.)

There can be no doubt, from the plain language of section 6 of the act of 1891, and from the provisions referred to, and other provisions of the various acts relating to immigration, that it was the clear intention of Congress to subject transportation companies and other corporations to the inhibition and penalties of this legislation. To hold otherwise would be to ignore its language and nullify its meaning and purpose. The mere fact that a corporation is not, in the ordinary use of the term, a "person," and can not be subjected to imprisonment, does not constitute a reason why it may not suffer the appropriate portion of the punishment prescribed by section 6 and why said section can not practically be enforced against it.

It is not necessary to multiply authorities on the principles involved. It is well established that a corporation is a "person" or "citizen" for many purposes. (*Railway Co. v. Mackay*, 127 U. S., 205; *Railway Co. v. Gibbs*, 142 U. S., 386; 15 Op., 230; 20 Op., 161; *St. Louis v. Ferry Co.*, 11 Wall., 423; *Newlor v. Dow*, 94 U. S., 444; *United States and Sioux Nation v. Transportation Co.*, 154 U. S., 686.) And a corporation is a "claimant" under the authority in the statutes allowing an order of the Court of Claims "directing any claimant * * * to appear * * * and be examined." (The Atchison Railroad Motion, 15 Ct. Cls., 1.) A corporation is not only liable to civil suit in contract and liable *civiliter* for torts committed, but it is generally liable for every wrong it commits and for all violations of the law, and is subject to proceedings therefor, criminal or quasi-criminal in their nature.

Section 1 of the Revised Statutes enacts that in determining the meaning thereof or of any act or resolution of Congress passed subsequent to the revision, the word "person"

may extend and be applied to partnerships and corporations unless the context shows that such words are to be used in a more limited sense. Certain acts defining and punishing offenses are specially directed against corporations; for instance, the immigration act of 1885 (23 Stat., 332) makes it unlawful for any corporation to prepay the transportation of an alien. The violation of this act is an offense, if not a crime, and the proceeding upon it to enforce the penalty laid down is quasi criminal in its nature. The act of July 29, 1892 (27 Stat., 325), revokes the licenses of certain foreign corporations doing business in the District of Columbia who fail to publish certain statements; and the act of August 13, 1894, (28 Stat., 279), relative to stipulations, etc., of certain surety corporations, provides for the forfeiture of a penalty to the United States for violations of the act. And certain portions of the war-revenue act of 1898, and the penalties therein denounced, are specially aimed at corporations. The act of January 22, 1894 (28 Stat., 28), directed against the false branding of armor plates, suggests the same question that we have here. That act and other legislation similar to the act before us necessarily contemplate that some one else than a subordinate servant or mere laborer of the corporation offending shall be reached and punished, and not only the responsible officer but the corporation itself. Under the antitrust act of July 2, 1890, it is provided that the word "person" as used in the act shall be deemed to include corporations, and it is held (*In re Greene*, 32 Fed. Rep., 104, 119) that a corporation offending against this act can readily be reached and prosecuted by the Government, either civilly or criminally, for what it may have done in contravention of the law. In view of the general rulings as to the effect of the word "person" it is not necessary that the word "person" should be specifically applied, as in the antitrust act, to a corporation in order to subject the corporation to the rule just stated.

A corporation is liable for the acts of its officers, agents, or servants done by its authority and for every wrong it commits, and in such cases the doctrine of *ultra vires* has no application (*Railway Co. v. Quigley*, 21 How., 202; *Bank v. Graham*, 100 U. S., 699; *Railway Co. v. Harris*, 122 U. S.,

597); and so as to quasi criminal acts of the corporation officers or servants (*Salt Lake City v. Hollister*, 118 U. S., 256).

If a corporation or "transportation company" is not included in the term or description "person" in section 6, then while the officers, agents, or servants of the corporation transgressing the law may be reached and punished and the corporation be indirectly controlled by the act in that way, nevertheless the employing company, the real and responsible offender, would escape, ignoring the provisions of the law, and setting aside the plain intent of Congress with impunity. To hold otherwise would be practically to destroy the operation of the act. Because as part of the statutory punishment the offender is liable to imprisonment does not make any real difference, or invalidate the penalty which may be imposed upon the corporation itself.

In 15 Opinions, 230, it was held that various provisions of internal-revenue laws show that a penalty for the enforcement of the tax on distilled spirits, prescribing imprisonment as part of the punishment imposed, can not be regarded as incompatible with a clearly expressed intent to make various provisions of the law relating to distilling applicable to corporations as well as to individuals. Practically, I see no reason why the fine alone should not be imposed upon the indictment and conviction of the corporation itself (either under ordinary criminal forms or by a proceeding analogous to a suit for the enforcement of a penalty), and both the fine and imprisonment, or either, in the discretion of the court, upon the indictment and conviction of the officer or employee of the corporation. The court may use its discretion generally in such a case, and impose either the fine or imprisonment, or both. Sometimes the court's discretion in the matter is specifically recognized (act of February 8, 1892, 29 Stat., 512), but it is to be implied as part of the court's sound discretion in exercising its judicial functions, unless the law provides otherwise. (*Ex parte Jackson*, 96 U. S., 727, 737.)

I may suggest here that the case of *Mergenthaler Linotype Company v. Ridder* (65 Fed. Rep., 853) is authority for the theory that the directors and officers of corporations may be enjoined by the court from further violations of law.

I conclude that corporation officers or servants responsible for or actually engaged in breach of the immigration laws under the act of 1891 are liable to the fine and imprisonment imposed by section 6, and the corporation itself is liable to a fine in the case of any and each alien brought into or landed in the United States, by vessel or otherwise, who is not entitled to enter, and I therefore answer the question submitted for my consideration by stating that the repeated endeavor on the part of transportation companies to bring into the United States aliens afflicted with a disease pronounced to be "loathsome or dangerous contagious" is embraced within the meaning of section 6 of the act of March 31, 1891, so as to make such companies liable in the way herein indicated to the penalties prescribed thereby.

Very respectfully,

JOHN W. GRIGGS.

The SECRETARY OF THE TREASURY.

DRAWBACK—SUGAR.

It being possible to ascertain the quantity or measure of sugar used in canning fruit for export, the drawback on such sugar under section 30 of the act of July 24, 1897, should be restored.

DEPARTMENT OF JUSTICE,

July 15, 1898.

SIR: In your communication of the 11th ultimo you state that in August, 1896, the practice which had theretofore existed of allowing drawback on imported sugar used in canning fruit for export was discontinued for the reason that all natural ripe fruits contain some cane sugar, and that the cane sugar present from the fruit itself can by no means be distinguished from the imported cane sugar added in the canning process; consequently, the imported sugar contained in the exported article can not be ascertained in the manner required by the first proviso of the drawback law—now section 30 of the act of July 24, 1897—as construed in the Attorney-General's opinion of December 28, 1894.

The proviso referred to requires that when an article exported is made in part from domestic material, the im-

ported material shall so appear in the completed article that the quantity or measure thereof may be ascertained, and in the opinion of December 28, 1894, it was held that this proviso forbids the allowance of a drawback except in cases where the article manufactured or produced can be so separated, chemically or mechanically, into its component materials, that the relative proportions of each material may be ascertained without reference to past books of account.

The application for an allowance of this drawback is now renewed on the ground that it is practicable to determine the quantity of foreign cane sugar in the exported canned fruit by ascertaining, through an analysis, the total quantity of cane sugar present in the canned fruit and then deducting the quantity of cane sugar shown by the records or ascertained through analysis to be derived from the fruit itself. Assuming that the quantity of imported sugar present in the fruit canned for exportation can be ascertained, in the manner indicated, you request my opinion upon the question whether the drawback applied for may be allowed.

In a later communication, dated the first instant, you transmit for my consideration a report from the customs auditor at San Francisco, setting forth the method followed in the ascertainment of the quantity of imported sugar used in the process of canning. I quote from this report:

“As the law provides for drawback equal in amount to the duties paid on the materials used, less 1 per centum, the matter is herein considered for the purpose of arriving at a rule to ascertain the quantity of sugar used.

“There is no difficulty in deducing the rule.

“(1) A customs officer may inspect or supervise the canning process, and take note of quantity of sugar added in putting up a certain number of cans of a given variety of fruit. The number of pounds of sugar so added, divided by the number of cans filled, will be the weight of sugar, per can, actually added.

“(2) Samples of such pack, taken then and there, may be analyzed by the Government chemist, for the purpose of showing quantity of sugar ascertained by analysis.

“(3) The result thus obtained by analysis may be compared with quantity of sugar actually added, as demonstrated by

customs supervision outlined above, for the purpose of determining the quantity of sugar allowable for drawback.

“For illustration:

“(a) Suppose the customs officer finds, by actual inspection, that 10,000 pounds of sugar is used in putting up 20,000 cans of apricots; the sugar added per can would be 8 ounces.

“(b) Suppose that the Government chemist finds by analysis 7 ounces of cane sugar from all sources in sample taken at time of canning;

“(c) Then it is a matter of clear demonstration that the proper allowance for drawback (on canned apricots) would be the quantity of sugar shown by analysis (7 ounces), plus one-seventh of itself, which equals 8 ounces, the quantity added in the canning process.”

* * * * *

“The first proviso of section 30 requires that when the exported article is made in part from domestic materials, the imported materials shall so appear in the completed article that the quantity thereof may be ascertained.

“In the example illustrated the domestic material is apricots; the imported material is cane sugar. Does the imported material so appear in the completed article that the quantity thereof (used in the manufacture) may be ascertained?

“Investigation at time of canning demonstrated that 8 ounces of imported cane sugar were used per can; analysis shows presence of 7 ounces of cane sugar.

“From this point the rule for ascertainment of quantity of imported cane sugar used is one of mathematics, pure and simple. The quantity to be ascertained is known to be 8 ounces, while the base for said known result is 7 ounces. Said base is the quantity of cane sugar shown by analysis to be present in the exported article, and it is immaterial to mathematics what may be the source of said cane sugar.”

It appears from your statement that it is possible, by analysis, to ascertain the quantity of cane sugar in the canned fruit. Deducting the known quantity of cane sugar derived from the fruit itself, you have the quantity of the imported material in the exported article. It further appears in the report I have so liberally quoted from that a method exists

for ascertaining, by a chemical analysis of the exported article, the quantity of imported material used in its manufacture.

In view of these facts and for the reasons stated in my opinion of the 13th instant, I am clearly of the opinion that the imported sugar does so appear in the exported canned fruit that the quantity or measure thereof may be ascertained, and therefore that the drawback on such sugar ought to be restored.

Respectfully,

JOHN K. RICHARDS,
Solicitor-General.

Approved.

JOHN W. GRIGGS.

The SECRETARY OF THE TREASURY.

CHINESE TRADERS.

Chinese persons known as traders are not entitled to admission to the United States for the first time upon presenting a certificate in accordance with the requirements of the act of July 5, 1884.

Chinese applicants for admission to the United States should comply strictly with the requirements as to certificates.

The true theory of the Federal law is not that all Chinese persons may enter this country who are not forbidden, but that only those are entitled to enter who are expressly allowed.

A trader is not expressly known to the law as among the exempt classes, nor is such a person fairly included in them unless as a merchant and the statutory language cannot be so construed.

DEPARTMENT OF JUSTICE,

July 15, 1898.

SIR: I have the honor to acknowledge the receipt of your communications of June 8, June 27, and June 28, with their various inclosures, relative to the admission into this country of certain Chinese persons known as "traders," under a certain form of certificate framed by the United States consul at Canton, China. The papers submitted present, in effect, the question whether the persons referred to are entitled to admission to this country upon presenting a certificate actually or substantially in accordance with the

requirements of the act of July 5, 1884, having in view the provisions of the treaty of December 7, 1894, upon the subject, relative to which question you request my opinion. It is understood that the Chinese persons involved seek admission to the United States for the first time.

The language of section 6, of the act of July 5, 1884, is mandatory, and provides that Chinese of the classes exempt under the treaty of 1880 or the act of 1884 "shall obtain" the permission of their Government to come to the United States, and shall be identified as so entitled, to be evidenced by a certificate, which shall conform to certain requirements and be viséd by the diplomatic or consular representatives of the United States in the country from which the certificate issues, or at the port whence the person in question is about to depart. One requirement is, if the applicant for admission is a merchant, that the certificate shall state the nature, character, and estimated value of his business. The case of *Wan Shang v. United States* (140 U. S., 424), confirming generally the necessity for the production of a certificate under the act of 1884, uses the language, "[The Chinese petitioner's] right to land, therefore, rested upon his establishing the fact that he was not a laborer." But this is to be understood as limited by the subsequent language of the court, viz, "Every Chinese person, other than a laborer, who may be entitled [by the treaty of 1880 and the act of 1882 as amended by the act of 1884] to come within the United States * * * shall be identified," etc. In other words, merely not to be a laborer is not conclusive of an applicant's right to admission.

It has been held by your Department that the omission of any of the statutory requirements from a certificate is a fatal defect, and that the provisions of the treaty of 1894 (presently to be referred to) do not waive any of the requirements of section 6 of the act of 1884 as to certificates of merchants and others of the exempt classes (*United States v. Yong Yew*, 83 Fed. Rep., 832), in accordance with 21 Opin., 6; *Id.*, 68. I concur in the opinions of my predecessor on these points. While it may be argued with force that the treaty of 1894, being the later law, may modify the requirements of previous legislation in some respects (21 Opin.,

347), I do not believe it can be successfully contended that because the language of the treaty of 1894 respecting the certificate of the exempt classes (Art. III, " * * * Chinese subjects, being officials, etc., * * * may produce a certificate," etc.) is not mandatory, but merely permissive, therefore the requirements of the act of 1884 are so far modified that substantial compliance therewith is sufficient. On the contrary, assuming for a moment that a "trader" is entitled to admission as in practical meaning a "merchant," I am of the opinion that a certificate which fails to state the "nature, character, and estimated value of the business" is fatally defective. Furthermore, the statutory definition of merchant (sec. 2, act of November 3, 1893, 28 Stat., 7) requires the merchant's business to be conducted in his name, which would exclude from classification as a merchant a clerk or "merchant's assistant," which is what "trader" appears to be. (21 Opin., 5.) But the opposite hypothesis that a "trader" is not a "merchant," and the elements of the latter's certificate are not requisite, leads us to considerations affecting the right of a "trader" to admission at all, which relegate to the background the question as to the proper form of certificate.

Laying aside as obviously not conclusive the general permissive language of our Chinese legislation, particularly of the earlier treaties and acts—e. g., Article V of the treaty of 1858, recognizing the mutual advantage of free migration "for purposes of curiosity, of trade, or as permanent residents"—it may be stated comprehensively that the result of the whole body of these laws and decisions thereon is to determine that the true theory is not that all Chinese persons may enter this country who are not forbidden, but that only those are entitled to enter who are expressly allowed. This view is recognized by the general name under which the laws are known, viz, the Chinese-exclusion acts. Rights have been conferred which may be enlarged, diminished, or taken away altogether at the will of Congress when the existing treaty obligations expire, as a larger measure of rights existing in the past has already been withdrawn. (*Chae Chan Ping v. United States*, 130 U. S., 581; *Nishimura Ekiu v. United States*, 142 U. S., 651, 659; *Fong Yue Ting*

v. *United States*, 149 U. S., 698; *Lem Moom Sing v. United States*, 158 U. S., 538; *Wong Wing v. United States*, 163 U. S., 228.)

The exempt classification is marked out by the phrase "officials, teachers, students, merchants, or travelers for curiosity or pleasure." While the suspension of Chinese immigration, foreseen in Article I of the treaty of 1880, was made to apply only to "Chinese who may go to the United States as laborers," the recognition of positive right in Article II describes the favored classes as "teachers, students, merchants, or [those proceeding to the United States] from curiosity." As the legislation by successive acts developed the view of the subject indicated above, which may be conceded to be a departure from or even a reversal of the early theory, those exempt were limited more strictly and defined more sharply. The acts of 1882 and 1884 exempted specifically only diplomatic and other officers of the Chinese Government and their body and household servants, and referred in section 6 of each act to Chinese persons other than laborers "who may be entitled by said treaty [1880] and this act to come within the United States." The act of September 13, 1888 (25 Stat., 476), which has been generally held not to have gone into effect (although there are conflicting decisions respecting the existing validity of certain portions of it), used the phrase "Chinese officials, teachers, students, merchants, or travelers for curiosity or pleasure" to describe the exempt classes. The act of May 5, 1892 (27 Stat., 25), by section 6 authorizes a certificate of residence to be issued to a "Chinese person other than a laborer having a right to be and remain in the United States." (See also sec. 1 of the act of November 3, 1893, 28 Stat., 7.) Finally the treaty of 1894 adopted the exact phraseology used in the abortive act of 1888.

From this review it appears that a "trader" is not expressly known to the law as among the exempt classes, nor is such a person fairly included in them unless as a "merchant." But in consequence of views hereinbefore expressed, especially with reference to the statutory definition of a "merchant," it is obvious that those described by the United States consular officer who maintains this classification as

proper and legally exempt and devised the appropriate certificate as men "who assist merchants in managing their business, such as salesmen, buyers, clerks, etc.," are not entitled to admission to this country. Although they may be, as stated by the consul in question, "a useful class who render valuable service as traders to merchants in the conduct of their business," it will, in my opinion, require additional enabling legislation by Congress to admit them.

I therefore answer the question proposed in the negative and return herewith the original papers inclosed, as you request.

Very respectfully,

JOHN W. GRIGGS.

The SECRETARY OF THE TREASURY.

STAMP TAX—OFFICIAL DOCUMENTS.

Papers and instruments executed, made or issued, and certificates given by officers of the United States in the discharge of their official functions and for the use and benefit of the Government are exempt from tax.

Checks or drafts issued by the disbursing officers of the United States upon Government funds on deposit, in payment of its obligations or dues, are exempt from this tax.

Stamps should be affixed to certificates or other instruments issued for private use, prior to their delivery, to be furnished by the party applying therefor.

DEPARTMENT OF JUSTICE,

July 18, 1898.

SIR: I have the honor to acknowledge receipt of yours of the 13th instant, in which you request my opinion on the following matter brought before the Department of State by the act of Congress approved June 13, 1898, known as the war revenue act:

"First. Is it necessary that the certificates of authentication of legal documents, of the seals of other Departments, of the seals of States, etc., issued by this Department under its seal, shall have affixed an internal-revenue stamp?

"Second. If such stamp is required by law, is it essential that it be affixed at the time the authentication is made, or may it be affixed by the party in interest afterwards?"

The Treasury Department, through the honorable Com-

missioner of Internal Revenue, has made a ruling, which has been approved by this Department, that papers and instruments executed, made, or issued by officers of the Government of the United States in the discharge of official functions pertaining to the operation of the governmental machinery and for the use or benefit of the United States are exempt from tax. In line with this ruling it is held that all checks or drafts made and issued by the disbursing officers of the United States upon Government funds on deposit, in payment of Government obligations or dues, are exempt, and all certificates of officers of the United States given in the discharge of official functions necessary in carrying on the machinery of the Government are also exempt. The same principle would extend to instruments and papers of whatever character (otherwise subject to tax) executed, made, or issued by officers of the United States Government for governmental purposes.

Where, however, certificates or other instruments are issued by any Department or officer of the Government at the request of private persons solely for private use a stamp should be affixed. And in answer to your second question you are advised that such stamp should be furnished by the person applying for the certificate or other instrument and for whose use and benefit the same is issued, and should be affixed before the document is delivered.

Very respectfully,

JOHN W. GRIGGS.

The SECRETARY OF STATE.

ARMY OFFICERS.

The act of April 22, 1898, providing for temporarily increasing the military establishment of the United States in time of war, makes no provision for the appointment of regimental officers where regiments are made up by companies, troops, or battalions furnished by two or more different States.

Regimental officers of such regiments as may be formed by contributions of companies from two or more States are to be appointed by the President of the United States, under the constitutional provisions which make him the Commander in Chief of the Army and Navy and which authorize him to appoint all officers of the United States whose appointment is not otherwise provided for by law.

DEPARTMENT OF JUSTICE,

July 18, 1898.

SIR: In obedience to your request for my opinion as to who possesses the power to appoint regimental officers of a volunteer regiment composed of companies taken from two or more States, I have the honor to advise you that by the act of April 22, 1898, providing for temporarily increasing the military establishment of the United States in time of war, and for other purposes, provision is made for the appointment of regimental and company officers by the governors of the States in which such organizations respectively are raised. The same act also authorizes the President, through the Secretary of War, to organize companies, troops, battalions, or regiments possessing special qualifications from the nation at large, not to exceed 3,000 men, under such rules and regulations, including the appointment of the officers thereof, as may be prescribed by the Secretary of War. The act, however, makes no provision for the appointment of regimental officers where regiments are made up by companies, troops, or battalions furnished by two or more different States. The authority given by the act mentioned to governors of States to commission officers is confined to organizations which are raised within the States, respectively. The direct authority given by the act to the President to commission is confined to such organizations with especial qualifications, not to exceed 3,000 men, as may be raised for the Volunteer Army.

It is obvious, therefore, that the regimental officers of such regiments as may be formed by contributions of companies from two or more States must be made under some authority not contained in the act of April 22. I think such authority is implied in the constitutional provisions which make the President the Commander in Chief of the Army and Navy, and which authorize him to appoint all officers of the United States whose appointment is not otherwise provided for by law. There may be some question whether the last-named provision is applicable to military officers, but I think there can be no doubt that, by virtue of the general authority of the President as Commander in Chief to raise an army and organize a regiment, he may appoint and com-

mission regimental officers where that power is not specifically vested in governors of the States.

Very respectfully,

JOHN W. GRIGGS.

The PRESIDENT.

NAVY—COURT-MARTIAL.

The conviction by a general court-martial properly called can not be ratified or confirmed by the Secretary of the Navy where one member of the court has been relieved by a subordinate without authority of the Secretary and another judge substituted in his stead.

The consent of the accused can not confer jurisdiction upon a court not possessing it by virtue of statutory authority.

Trial by a court not legally constituted is not a trial which can be said to be "due process of law."

DEPARTMENT OF JUSTICE,

July 18, 1898.

SIR: I have your communication of the 9th instant, setting forth the trial and conviction by general court-martial at Mare Island, Cal., of John A. Brown, and asking my opinion as to whether you can ratify and confirm the act of Commodore Crowninshield, chief of the Bureau of Navigation, who undertook to substitute Past Assistant Engineer Gage for Assistant Engineer William S. Smith, appointed by you as one of the five judges of the court.

It appears that the court met on June 27 last, all the members being present except one; that Commodore Crowninshield sent the following telegram:

"WASHINGTON, D. C., *June 26.*

"NAVY-YARD,

Mare Island, Cal.:

"Please substitute P. A. Eng. Gage for court-martial duty, vice Smith.

"CROWNINSHIELD."

It appears further that this telegram was not authorized by you; that Gage took the place of Smith, and the court thus completed, with the minimum number of judges allowed by law, did, on the 27th day of June, try and convict

Brown; that the finding is now awaiting approval or disapproval, and that on June 28 you sent the following telegram to the senior officer of the court:

“Passed Assistant Engineer Gage appointed member general court-martial vice Assistant Engineer Smith, relieved. This order takes effect upon completion of a case.”

It is evident that Smith was not relieved, nor Gage appointed by competent authority, until after the conviction of Brown, and that unless now made so by ratification, the court was not a legal court-martial or body known to the laws, so far as the trial of Brown is concerned. The consent of the accused can not confer jurisdiction upon a court not possessing it by virtue of statutory authority.

In my opinion, such a proceeding as here presented can not be made good. If one judge can be illegally appointed, all can be. If a minor offense can be tried by such an unauthorized body, a capital offense can be. Aside from constitutional provisions, it is a plain dictate of common justice that no person shall be deprived of life or liberty without due process of law. Trial by a court not legally constituted is not a trial which can be said to be “due process of law.”

I am of the opinion, therefore, that the so-called court-martial, so far as the trial of Brown is concerned, must remain illegal, and its judgment ought not to be enforced.

Respectfully,

JOHN W. GRIGGS.

The SECRETARY OF THE NAVY.

RIVERS AND HARBORS—SAN PEDRO, CAL.

In the river and harbor act of June 3, 1896, providing a deep-water harbor for commerce and of refuge at San Pedro, Cal., it was the purpose of Congress that it should be a deep-water harbor in the sense of having a sufficient depth of water to accommodate vessels of large draft, but not necessarily vessels of the greatest draft now constructed. It was not the intention of Congress that out of the appropriation made the harbor should be equipped with piers, jetties, and channels necessary for the highest condition of usefulness and efficiency.

The project reported by the board of officers selected for that purpose is a breakwater, and fulfills the provisions of the law and will make within its meaning a harbor for commerce and of refuge.

Under this act the Secretary of War is not called upon to make further plans, specifications, or estimates for other work not included within the plans and specifications adopted by the court.

DEPARTMENT OF JUSTICE,

July 19, 1898.

SIR: By letter of July 8, 1898, you submit for my consideration and opinion certain questions arising out of a provision of the river and harbor act, approved June 3, 1896, providing for a deep-water harbor for commerce and of refuge at Port Los Angeles, in Santa Monica Bay, California, or at San Pedro, in the said State, the location of said harbor to be determined by a specially appointed board of officers. The provision of the river and harbor act referred to is as follows:

“For a deep-water harbor for commerce and of refuge at Port Los Angeles, in Santa Monica Bay, California, or at San Pedro, in said State, the location of said harbor to be determined by an officer of the Navy, to be detailed by the Secretary of the Navy, an officer of the Coast and Geodetic Survey, to be detailed by the Superintendent of the said Survey, and three experienced civil engineers, skilled in riparian work, to be appointed by the President, who shall constitute a board, and who shall personally examine said harbors, the decision of a majority of which shall be final as to the location of said harbor. It shall be the duty of said board to make plans, specifications, and estimates for said improvement. Whenever said board shall have settled the location and made report to the Secretary of War of the same, with said plans, specifications, and estimates, then the Secretary of War may make contracts for the completion of the improvement of the harbor so selected by said board, according to the project reported by them, at a cost not exceeding in the aggregate two million nine hundred thousand dollars; and fifty thousand dollars is hereby appropriated, so much thereof as may be necessary to be used for the expenses of the board and the payment of the civil engineers for their services, the amount to be determined by the Secretary of War.”

By your letter you advise me that the board authorized by this act was duly organized, made the investigation

required, and reported under date of March 1, 1897, locating said harbor at San Pedro, and submitting plans and specifications for the construction of a breakwater. You also submitted to me with your letter a copy of the report of the said board with accompanying documents.

It appears from your letter and from the official files of this Department that doubts having arisen in your mind as to your authority to proceed and award contracts for the completion of the improvement comprised in the project of the said board, you submitted the matter to the Attorney-General for his advice and instructions, and that by an opinion dated August 9, 1897, you were advised by the Attorney-General as follows:

“From a careful consideration of the report of the board I am of the opinion that the project reported by them is a breakwater, and that it fulfills the provision of the law and will make within its meaning a harbor for commerce and of refuge.”

You further state that, acting upon this opinion, you have advertised for proposals for the construction of the breakwater at San Pedro; that bids have been received and opened and are on file in your Department, but that no award has yet been made.

It appears that on the 13th of July, 1897, the Senate of the United States passed a concurrent resolution reciting that the Secretary of War had reported to the Senate that he had serious doubts as to his authority to make contracts for the construction of a breakwater at San Pedro, and had asked for the instruction of Congress with reference thereto, and reciting further that it was important that any doubt on the subject should be removed by Congressional interpretation, and thereupon resolving that the Secretary of War was thereby authorized to advertise for bids for the construction of a breakwater at San Pedro in accordance with the project recommended in the said report, provided the same could be contracted for within the limit authorized by the provisions of the river and harbor act of June 3, 1896.

This resolution, being concurrent and never having passed the House of Representatives, never became operative.

You further call my attention to a provision in the sundry civil bill, approved July 1, 1898, which is as follows:

“Improving harbor at San Pedro, Cal.

“For construction of a deep-water harbor for commerce and of refuge at San Pedro, Cal., in accordance with the plans and specifications of the board appointed by the President, as provided in the act of June 3, 1896, \$400,000, but nothing herein shall be construed to extend the limit of cost of improvement of the harbor at San Pedro, Cal., as authorized by said act of June 3, 1896.”

You further call my attention to the report of certain remarks made by the chairman of the Committee on Appropriations of the House of Representatives at the time the above-mentioned item of appropriation was under consideration in the House.

I have not thought it necessary to quote in this opinion the remarks of the chairman of the Committee on Appropriations, particularly as I find nothing in them which is in conflict with the view which I have taken of the questions which you have submitted to me.

The questions which you desire me to answer are submitted in the following language:

“Because of my doubts as to the proper construction of the act of 1896, intensified by the failure of the House of Representatives to adopt the resolution of construction passed by the Senate July 13, 1897, and by the statements made by the chairman of the Committee on Appropriations in the House of Representatives, hereinbefore quoted, together with the explicit reenactment in the sundry civil appropriation bill of the limitation contained in the act of June 3, 1896, and the repetition in that provision of the last-named act as to the object of the expenditure, to wit, for the deep-water harbor for commerce *and of* refuge I have the same doubt as to the course which it is my duty to pursue in the matter which I had in 1897. I therefore have the honor to request your opinion upon the following questions:

“First. Can this Department lawfully enter into contract for the construction of a breakwater alone at San Pedro, Cal.?

“Second. If under the law there is necessity for securing

within the limit of \$2,900,000 the completion of a deep-water harbor for commerce, as well as of refuge, and as no plans, specifications, or estimates were specifically made by the board for that part of the improvement covering a harbor for commerce, is it within the power of the Department to make, using its official force for the purpose, the necessary plans, specifications, and estimates for such a harbor?"

If I appreciate correctly the doubts which embarrass you, they arise out of this, to wit, that the part of the river and harbor act of June 3, 1896, above quoted provides for "*a deep-water harbor for commerce and of refuge*"; that the board appointed under that act has reported a project calling for the construction of a breakwater only; that the construction of a breakwater only will not within the meaning of Congress be the completion of a deep-water harbor for commerce and of refuge; that the whole amount of the appropriation, \$2,900,000, will be required to construct the breakwater, and before a deep-water harbor for commerce and refuge, within the meaning of the act, can be completed at San Pedro, the expenditure of a much larger sum will be required. Your fear is, as I understand it, that if you contract for the construction of a breakwater only, you will have expended the whole appropriation, and will not have completed the improvement, and thereby will have violated not only the provisions of the original act of June 3, 1896, but also the proviso of the sundry civil bill above quoted.

I think much of the doubt and embarrassment that have arisen in this matter are due to the unfortunate attempt of the board, in their report, to give a definition of the phrase "deep-water harbor for commerce and of refuge." On page 4 of this report the board says:

"The act under which this board is appointed provides for a deep-water harbor for commerce and of refuge. Under the provisions of the law a deep-water harbor is understood to be a harbor which can be used by vessels of the deepest draft. Merchant vessels drawing from 26 to 28 feet are now common, while steamers have been built which, when fully loaded, will draw 30 feet, or even more. The deepest draft of any vessel in the United States Navy exceeds 27 feet, while some foreign naval vessels draw fully

32 feet. In view of these facts, it would seem that a deep-water harbor must be one which will safely accommodate vessels drawing at least 30 feet.

"The provision that it shall be a harbor for commerce is understood to mean that it shall be a harbor in which vessels can load and discharge cargoes in convenient proximity to suitable facilities for storage and for interchange between land and water transportation. In many ports of the world this work is done by the aid of lighters while the ships lie at anchor, a slow and expensive method which can no longer be considered satisfactory. A deep-water harbor for commerce should be such that the deepest ships can come alongside quays or piers where they can lie quietly during rough weather to receive and discharge their cargo, and where proper facilities for docking and repairs may be afforded.

"The provision that it shall be a harbor of refuge is understood to mean that it shall be a harbor which all classes of vessels can enter in stress of weather without waiting for tides, and where they can anchor in safety at all times. The depth of water in the proposed harbor of refuge must be such that the largest ships can safely ride at anchor within its limits, swinging over their own anchors without danger."

In so far as this definition by the board is intended to apply to a completely finished and equipped deep-water harbor for commerce and of refuge, sufficient to meet all possible requirements for any place or part of the world, it probably is scientifically correct; but so far as it is intended to be an exposition of the meaning and purposes of Congress, as expressed in the provision of the river and harbor act of June 3, 1896, it is erroneous and misleading. In my judgment, Congress meant to provide for the establishment of a harbor at one or the other of the two ports named. It clearly meant that that harbor should be a deep-water harbor in the sense of having a sufficient depth of water to accommodate vessels of large draft, but not necessarily vessels of the greatest draft now constructed. Congress also undoubtedly intended that the harbor should be such as could be used for commerce; but it is unreasonable to suppose that Congress meant that the harbor, when improved by the appropriation granted, should be completely equipped with piers, jetties,

channels, and all other modern improvements necessary to bring it to the very highest condition of usefulness and efficiency.

The same comment may be made upon the definition which the board has attached to the phrase "harbor of refuge." Certain language in the act of June 3, 1896, is significant of the purpose of Congress. The board is directed to "personally examine said harbor." From this it is manifest that Congress understood that there was already a harbor naturally existing both at Port Los Angeles and at San Pedro. The act has this further language: "It shall be the duty of said board to make plans, specifications, and estimates for said improvement." This further phrase occurs: "The Secretary of War may make contracts for the completion of the improvement of the harbor so selected by said board, according to the project reported by them."

From all this it is obvious that Congress meant to authorize the expenditure of a sum not exceeding \$2,900,000 in improving either the harbor at Port Los Angeles or the harbor at San Pedro, as might be determined by the board and according to a project to be reported by them, provided the project so reported should, within the reasonable meaning of the words as applied to that locality and to the conditions both natural and commercial there existing, fairly and reasonably establish a harbor where vessels of deep draft could resort for purposes of commerce and for refuge in stress of weather.

Undoubtedly the board in recommending San Pedro as the harbor upon which the expenditure was to be made, and in reporting the plans and specifications for a breakwater, understood that it was complying fully with the terms of the act.

The board expressly says on page 17 of its report that the extension of the jetties and the deepening of the inner harbor are not a necessary part of the immediate construction required for the deep-water harbor provided for by law. The board further says: "At neither location can a deep-water harbor, which will meet the requirements of the law, be constructed within the limits of the shore line; it can only be made by a breakwater which will furnish the neces-

sary area of protected smooth water behind it." Again they say (p. 11): "The principal duty of a breakwater is usually to provide a safe and commodious anchorage." Again, on page 18, the board says:

"The estimates and descriptions already given show that a harbor can be constructed at either point which will meet the requirements of the law."

In stating their final conclusion, at page 23, the board says:

"It is the conclusion of this board, therefore, that the opportunity for a harbor of refuge as planned for San Pedro, and the availability of both the interior harbor and Wilmington Lagoon for improvements and development to any extent that can now be anticipated, meet more fully the requirements of the law than the possibilities offered at Port Los Angeles."

It is apparent that the board, notwithstanding the unfortunate definition they have given of a deep-water harbor for commerce and of refuge, were of the opinion that the construction of a breakwater according to the plans and project reported by them was a complete fulfillment of the requirements of the law, and that, when in their report they speak of other improvements within the inner harbor, they were thinking of such matters as might afterwards be done either by the private enterprise of riparian owners in the construction of piers, wharves, jetties, etc., or such further improvements as might afterwards be authorized by Congress for the purpose of rendering the harbor more highly efficient.

Without going further into a discussion of the question, I may say that I concur fully in the conclusion of my predecessor expressed in his opinion of August 9, 1897, to the effect that the project reported by the board is a breakwater and fulfills the provision of the law, and will make within its meaning a harbor for commerce and of refuge.

In my judgment the failure of the House of Representatives to concur in the resolution of the Senate declaratory of the meaning of the appropriation can not be taken to affect the conclusion above stated. If any force is to be given to it, the express declaration of the Senate in favor of the interpretation here given is to be offset against any con-

clusion which might be inferred from the failure of the House of Representatives to agree with the Senate.

I think, however, in this connection the terms of the above-quoted item in the sundry civil bill of July 1, 1898, are very important. That item reiterates the purpose of Congress not to allow a greater sum than \$2,900,000 to be expended in this work; but at the same time it expressly appropriates \$400,000 toward the construction of a deep-water harbor for commerce and of refuge at San Pedro, *in accordance with the plans and specifications of the board appointed by the President*. Here Congress by express enactment recognizes the plans and specifications of the board as plans and specifications for which it is proper to make an express appropriation, and Congress does make toward the completion of those plans an express appropriation of \$400,000. In my judgment this is a Congressional ratification of the interpretation put upon this act and upon the report of the board by my predecessor, and is a sufficient justification for the Secretary of War to proceed and award bids for the construction of the improvement called for in the project of the board and defined by their plans and specifications. I think this is all the Secretary of War is called upon to do. I do not think he is called upon to make further plans, specifications, or estimates for other work not included within the plans and specifications adopted by the board. If I am correct in the view I have taken of the case, when this project reported by the board is completed the act of Congress will have spent its force and the improvement contemplated by the river and harbor act of 1896 will have been made.

Very respectfully,

JOHN W. GRIGGS.

The SECRETARY OF WAR.

ARMY—MILITIA—OFFICERS.

The act of April 22, 1898, providing for temporarily increasing the military establishment of the United States, in conferring the appointment of certain officers upon the governors, when the members of a militia organization enlist in the Volunteer Army, confers such privileges only when a majority of the members of such organization enlist as a body.

The term "officers" as used in this connection applies only to the commissioned officers.

Under this act the appointment of the officers of a militia organization to corresponding grades in the Volunteer Army may be made even though the militia organization was formed subsequently to the call of the President for volunteers.

Under this act, where a regiment or battalion is made up respectively of battalions or companies from two or more States, the governor of each State would be entitled to appoint the officers of the companies or battalions by them respectively contributed in a body.

If a battalion is made up of companies contributed by two or more States the officers of the battalion as such must be appointed by the President.

DEPARTMENT OF JUSTICE,

July 20, 1898.

SIR: By a communication under date of July 19 instant you submit for my opinion certain questions arising in your Department under the following provision of the act entitled "An act to provide for temporarily increasing the military establishment of the United States in time of war, and for other purposes," approved April 22, 1898:

"That the Volunteer Army and the militia of the States, when called into the service of the United States, shall be organized under, and shall be subject to, the laws, orders, and regulations governing the Regular Army: *Provided*, That each regiment of the Volunteer Army shall have one surgeon, two assistant surgeons, and one chaplain, and that all the regimental and company officers shall be appointed by the governors of the States in which their respective organizations are raised: *Provided further*, That when the members of any company, troop, battery, battalion, or regiment of the organized militia of any State shall enlist in the Volunteer Army in a body, as such company, troop, battery, battalion, or regiment, the regimental company, troop, battery, and battalion officers in service with the militia organization thus enlisting may be appointed by the governors of the States and Territories, and shall, when so appointed, be officers of corresponding grades in the same organization when it shall have been received into the service of the United States as a part of the Volunteer Army."

For convenience of arrangement I will state the questions

which you submit in the order in which they are propounded, answering them in the same order:

“1. Should the provision conferring certain privileges ‘when the members of’ a militia organization enlist in the Volunteer Army be construed as applying when not all, but only a portion, of such members enlist, or offer themselves for enlistment? In cases, which it is believed have occurred, where 50 per cent or less of the militia organization so enlist would the provision as to the appointment of officers of the militia organization in the volunteer organization apply?”

It can not be said that a militia organization of a State has enlisted in the Volunteer Army “in a body” unless at least a majority of the organization shall have come directly from the service of the State into the volunteer service of the United States. Where less than a majority of the members of a militia organization so enlist, they are not entitled to represent or to be called the organization, for they are not a majority. In my opinion where more than 50 per cent of the members of such organization enlist, claiming to do so as a body, and coming in under such circumstances as to indicate that they have enlisted in good faith as an organization, the law would apply, and whatever privileges are conferred upon such an organization they would be entitled to them.

“2. Is the term ‘officers’ in the provision authorizing the appointment in certain cases of militia officers to corresponding grades in volunteer organizations to be understood as applying to *commissioned* officers only? Laws and army regulations and orders relating to *noncommissioned officers* uniformly so state specifically.”

From the statement contained in your question, and from other information derived from your Department, I am instructed that in all instances in departmental usage the term “officers” is intended to include only commissioned officers, and that where noncommissioned officers are referred to, they are uniformly so described. In my opinion that usage of the term is entitled to regulate and define the meaning to be put on the word “officers” as used in the act in question.

"3. To entitle the officers of a militia organization to appointments of corresponding grades in the Volunteer Army, will it be a sufficient compliance with the law if the militia organization be raised and organized in consequence of and subsequent to a call of the President for volunteers, and immediately prior to the enlistment of its members in the volunteer organization furnished by the State in response to the call."

This question I answer in the affirmative. If the militia organization which enlists into the Volunteer Army was a *bona fide* organization in accordance with the laws and regulations of the State to which it pertained at the time of its enlistment, it is immaterial whether its State organization was formed prior or subsequently to the call of the President for volunteers.

"4. In cases where a volunteer regiment or battalion is composed of officers and enlisted men who were members of two or more militia organizations, would the governor of the State be entitled to appoint officers to grades in the volunteer organization corresponding to those allowed by State law to a similar militia organization, and where the officers, if so appointed, would be in excess, as to number or grade, of those authorized by the laws and regulations applicable to the Regular Army?"

If a volunteer regiment is made up of separate companies or battalions contributed by two or more States, the governor of each State would be entitled to appoint the officers of the companies or battalions by them respectively contributed in a body. He would not be entitled to appoint the regimental officers to which the regiment is entitled by reason of its organization in that form. The same would apply to a battalion. If a battalion is made up of companies contributed by two or more States, the governors respectively of each State would be entitled to appoint the officers of the companies, but the officers of the battalion as such would be appointed by the President of the United States. In all cases where appointments to such organizations are to be made by the President, the same law as to number and rank would apply that applies to regiments

authorized by the laws and regulations applicable to the Regular Army.

Very respectfully,

JOHN W. GRIGGS.

The SECRETARY OF WAR.

HAWAIIAN ISLANDS—TONNAGE TAX.

When territory is acquired by treaty or conquest, or otherwise, its relation to the nation acquiring it depends upon the laws of that nation, unless controlled by the instrument of cession.

In the resolution annexing the Hawaiian Islands Congress affirmatively indicated its intent that such laws as our tonnage tax laws are to remain undisturbed until it shall provide a form of government for such islands, or until the commission shall advise and Congress shall enact legislation therefor.

The fact that the Hawaiian Islands have been annexed to the United States does not relieve vessels from such ports from being considered as from foreign ports and as coming under the laws governing tonnage tax.

DEPARTMENT OF JUSTICE,

July 22, 1898.

SIR: You ask my opinion as to whether the tonnage tax should be collected from vessels coming from Hawaiian ports.

The resolution of Congress which, with the corresponding action of the Republic of Hawaii, annexed the Hawaiian Islands to the United States, operated for international purposes to make those islands part of the territory of the United States. But when territory is acquired by treaty or conquest, or otherwise, its relations to the nation acquiring it depend upon the laws of that nation unless controlled by the instrument of cession. It may for certain purposes remain foreign temporarily or permanently, and is not presumed to be at once put upon the same footing as all other territory of the nation, but rather the contrary.

When, therefore, Florida had been ceded and fully transferred to the United States, its ports were regarded as foreign within the meaning of our revenue laws. (*Fleming et al. v. Page*, 9 How., 617.)

This being so, it seems to me we should be able to find some provision in the resolution annexing the Hawaiian Islands indicating an intention to change the relations of

our tonnage-tax laws to Hawaiian ports and vessels coming from them, or those relations should be regarded as continuing.

Such an intent I do not find in the general declaration annexing the islands as part of the territory of the United States. That declaration, there having been no treaty, is intended to have the effect of a treaty of cession merely. It is the act whereby the islands become, in a broad sense, subject to American sovereignty. How that sovereignty will regulate their status, with regard to itself and its laws, is not thereby intended to be determined.

Neither do I think that the express declaration that our land laws and certain other laws shall not apply to the islands carries the implication that other laws shall apply to them upon the principle, often misunderstood, that the expression of one thing often excludes another.

On the other hand, the resolution is replete with indications that temporarily the relations of the two countries are to continue practically unchanged. Even some of Hawaii's relations with other countries are so to continue; its government is still to exist and collect its revenues; its laws are to remain in force, however at variance with our laws, and the powers—civil, judicial, and military—exercised by its officers are still to be exercised. It is, moreover, plainly apparent that Congress regards the establishment of an American government for and the extension of American laws to the islands as matters to be attended to in the future upon a consideration of the wide separation of the two countries in locality and character.

If we should hold the previous relations of the two countries altered as suggested, we should vainly look through the resolution for any adequate provision for enforcing such laws as are supposed to apply to the islands. No arrangement is made for collecting our tonnage tax upon vessels of other countries entering Hawaiian ports, nor is any other tax law or other law of the United States, unless it be the law prohibiting Chinese immigration, expressly or impliedly furnished with instrumentalities for its execution.

It seems to me that in view of this general plan and of the express declaration that the existing customs relations,

elsewhere spoken of as “the present commercial relations,” of the Hawaiian Islands with the United States and other countries are to remain unchanged, it is not going too far to say that Congress has affirmatively indicated its intent that such laws as our tonnage-tax laws are to remain undisturbed by the annexation of the islands until “Congress shall provide a government for such islands,” or until a commission shall advise and Congress enact “such legislation concerning the Hawaiian Islands as they deem necessary or proper.”

Vessels from Hawaiian ports, therefore, having been from foreign ports within the meaning of the tonnage-tax law, have not ceased, in my opinion, to be vessels from foreign ports within the meaning of that law.

Respectfully,

JOHN W. GRIGGS.

The SECRETARY OF THE TREASURY.

WAREHOUSES—CUSTOMS.

Where a warehouse company refuses the delivery of goods for exportation, because of the nonproduction of a warehouse receipt, notwithstanding the permit from the collector, the Secretary of the Treasury is under no obligations and can not properly grant authority to compel the delivery of the goods.

While the Government, under regulations, nominally delivers the merchandise for exportation, it does not relinquish possession of, but is interested in retaining it.

A warehouse is a private institution in charge of a public officer, and the Secretary of the Treasury may establish rules and regulations not inconsistent with law for the due execution of the laws relating thereto and to secure a just accountability under the same.

Goods in a bonded warehouse may belong to one who is not the consignee and may be transferred by warehouse receipt or otherwise.

A warehouseman is interested in the joint custody with the Government by reason of his risks, his storage, and his contractual relations.

The private rights of the warehouseman and those having relations with him as such are in no wise affected by this joint custody, providing the rights of the Government in and about the collection of its customs are not interfered with.

DEPARTMENT OF JUSTICE,

July 23, 1898.

SIR: I have your letter of the 18th instant, asking my opinion upon the questions presented by a case in which you

are asked to issue authority to the collector at the port of Philadelphia to compel the delivery to F. B. Vandergrift & Co. of certain tiles entered by them and deposited in a bonded warehouse.

It appears that the warehouse company refuses delivery of the goods for exportation, notwithstanding a permit from the collector, because of the nonproduction of a warehouse receipt issued at the request of Vandergrift & Co. to one Von Zuilen and by him transferred for value to A. R. McHenry; and that you have refused the authority requested in consequence of an opinion of one of my predecessors dated September 28, 1895, holding that "all duties having been paid and the delivery permit issued, the Government has no further concern with the whisky, and the right to deliver or withhold delivery rests with the warehouseman alone. The collector of customs has no authority to take any further action in the matter or to interfere or direct the storekeeper to interfere in the controversy between the importers and the warehouseman."

It is contended, and rightly, I think, that this present case is distinguishable.

Under regulations having the force of law, the Government, while nominally delivering the merchandise for exportation, merely transfers it from the storekeeper to the surveyor to be by the inspector laden on board a vessel, in order to insure the departure of the goods from the port. It does not relinquish possession, but is interested in retaining and does retain it, notwithstanding permit to deliver and the delivery under it. It can not be said, therefore, that after issuing a permit and before such delivery, which may be delayed indefinitely by one cause or another, the Government has no further concern with the goods. The goods have not been actually delivered; they may not be, and the duties have not been paid.

But it does not suffice to thus distinguish this case from the one referred to.

Under Revised Statutes, 2960, private warehouses are "in charge of a proper officer of the customs, who, together with the owner and proprietor of the warehouse, shall have the joint custody of all the merchandise stored in the ware-

house." It is stored there at the option of the owner of the goods and at his risk and expense or risk of the warehouseman. The warehouse is a private institution; the owner of it and of the goods contract between themselves for the storage. The warehouse is in charge of a public officer, the storekeeper, and the Secretary may establish rules and regulations, not inconsistent with law, for the due execution of the laws relating to warehouses and to secure a just accountability under the same. (Rev. Stat., 2989.) "The merchandise withdrawn for exportation shall be subject only to the payment of such *storage* and charges as may be due thereon." (Rev. Stat., 2971.) The Government is not responsible for the safe-keeping of the goods (Rev. Stat., 2962), and all labor on the stored merchandise must be performed by the warehouse proprietor, under the supervision of the officer in charge of the warehouse. (Rev. Stat., 2960.)

It is provided by Revised Statutes, 3058 (reenacted February 23, 1887; see S. T. D., 7890), that "for the purpose of this title"—i. e., "collection of customs"—goods imported into the United States shall be deemed the property of the consignee; but the rights of property, etc., are not otherwise intended to be interfered with.

It is evident that goods in a bonded warehouse may belong to one who is not the consignee, and may be transferred by warehouse receipt, as alleged here, or otherwise, from one ownership to another. It is also evident that the warehouseman is interested in the joint custody by reason of his risks, his storage, and his contractual relations.

Is there anything in the private warehouse system to prevent the warehouseman from recognizing and acting upon the real ownership? Is he to be compelled to act in disregard of such ownership through force used by his joint custodian? It seems to me that all his rights and all the rights of his customers and others interested are left in full play, notwithstanding his association with the Government, up to the point of interfering with "the purpose of this title—" that is, the protection of all the Government's rights in and about the collection of its customs. In protecting the Government's lien and interests the collector may not be required to consider all the complications of title, but it seems to me

the rights of the warehouseman in this matter begin where the interests of the Government end. (*Conrad v. Ins. Co.*, 6 Peters, 281.)

In the present case the collector issued a permit and issued it to the petitioner, who now complains that a permit is not enough and demands compulsion of the warehouseman by the collector. It is not a question of collecting any customs duty or preserving any right or custody of the Government. It is not a question whether the collector shall give effect to a warehouse receipt title or ignore that and other asserted titles while proceeding to collect duties and protect the interests of the Government. Compulsion of the warehouseman in the interest of the petitioner and without any advantage to the Government is demanded, and this petitioner is not in reality the owner and does not claim to be.

The collector has issued the permit; the storekeeper stands ready to obey it. So far as the Government is concerned, the door of the warehouse is open. The collector is not a sheriff or marshal, nor does any law or regulation purport to make him master of the warehouseman. The importer, Von Zuilen, to whom the outstanding warehouse receipt was issued at the instance of the brokers, Vandegrift & Co., has not paid the storage due the warehouse company. What is the extent of liability incurred by the warehouse company to Von Zuilen, to whom it gave a receipt for the goods, to be delivered on presentation of the warehouse papers, or to the endorsee, McHenry, need not be determined; nor need the right of the warehouse company when goods are sold, after three years, to storage, etc., be discussed. Neither shall I stop to inquire what remedies, if any, consistent with the Government's lien, the courts may afford to Vandegrift & Co., holders of the withdrawal permit, the goods not being detained by the Government against his demand to export them. The storage remains unpaid, and Vandegrift & Co., as appears from their communication, have no intention of tendering it in advance of the proposed exportation.

Upon all the facts as called to your attention, and as admitted by Vandegrift & Co., I am of opinion that you are

156 CONTRACTS—RIVER AND HARBOR IMPROVEMENTS.

under no obligation to grant the authority demanded and can not properly do so.

In accordance with your request I return the inclosures of your letter.

Respectfully,

JOHN W. GRIGGS.

The SECRETARY OF THE TREASURY.

CONTRACTS—RIVER AND HARBOR IMPROVEMENTS.

The Attorney-General can not undertake to settle conflicting questions of fact raised by various papers presented, but will look to the submitted statement of facts alone.

The requirements as to time, with reference to the improvement of the outer bar of the harbor at Brunswick, Ga., under the river and harbor acts of 1894 and 1896, have been sufficiently complied with in respect to the certificate and payment of \$100,000, and the certificate may be authorized.

The word "assigns" in the said acts of 1894 and 1896 is intended to point out the party or parties who took over by formal assignment all rights to or interest in a contract, or such measure of rights and interest as carve out a complete share in the undertaking itself, with all its risks and incidents. The assignee recognized must take in accordance with the method and formalities provided by section 3477, Revised Statutes.

The Government should not construe a contract between third parties or between their contractor and others or judicially determine the respective rights under such a contract merely for the reason that its terms relate to a Government undertaking.

The phrase "legal representatives" in the act of 1896 refers to those who may be charged with the administration of the contractor's estate, or as equivalent to the "assigns" of the contract as an integral thing.

There being a question as to the assignment of a contract under the river and harbor act, all parties may execute an agreement in the nature of a trust to embody a release to the United States as to a present payment and an agreement to release as to future payments, and providing for payment to a trustee for disbursement.

DEPARTMENT OF JUSTICE,

July 29, 1898.

SIR: I have the honor to acknowledge the receipt of your communications of June 4 and 9, and of July 13, with their accompanying inclosures, relative to the contract by the United States with C. P. Goodyear, created by the river and harbor acts of August 18, 1894, and June 3, 1896, and

by certain previous statutes to which you refer, for improving the outer bar of Brunswick, Ga., and relative to the claim of J. Floyd King, upon the avails of said contract, concerning which subjects you state certain facts and submit the questions arising, and request my opinion thereon.

The facts stated by you show that the acts mentioned provided for certain successive or graduated payments to "C. P. Goodyear, his heirs or assigns," upon the procurement "by him or them" of a practical channel of a certain minimum width and depth by a certain date, and of certain additional or increasing widths and depths by certain other dates, with a certain further payment if the maximum depth and width should be maintained for two years. The acts require that no payments thereunder shall be made "to Goodyear or his legal representatives" except upon the certificate of a board of officers therein constituted, showing that "said C. P. Goodyear, his heirs and assigns" have complied with the requisite conditions as to widths, depths, and maintenance of depth. It is also provided that all of the deepening of the bar shall be completed by June 3, 1899. It now appears from the report of the Government officer designated by the Secretary of War to make the necessary survey that sufficient width and depth have been secured by the contractor in the channel over the bar to entitle him to a payment of \$100,000, for which he has made application. It also appears that your Department has received a notice from J. Floyd King to the effect that he is an assignee of one-third interest in the said contract, and that your Department has recognized this interest and General King's connection with the work in certain correspondence, in connection with which you refer me to the report of the Judge-Advocate-General and to the contracts by which General King takes his interest, and to the reasons urged in his behalf why his claim should be recognized in the certificate to be issued and the payment to be made.

I can not, consistently with my statutory functions and duty, undertake to settle the conflicting questions of fact raised by the various papers submitted, under which it is contended, in the interest of Mr. Goodyear, in view of the language of the contracts between him and General King,

that the latter is merely interested in contingent profits, that the payment of \$100,000 in question will be entirely absorbed in the discharge of valid indebtedness existing against the undertaking, and that the creditors look solely to Goodyear as the party responsible to the Government and to themselves for payment, which claim is supported by sundry letters from bankers, material men, and others, who state the character and amount of their claims; and under which it is contended, on the other hand, in the interest of General King, that his right amounts substantially, in fact and in law, to a share in the contract itself and its incidents, including the control and supervision of the work; that he is, within the terms and meaning of the acts, one of the "assigns" and "legal representatives" expressly contemplated, and that he is therefore entitled to be named in the certificate and to receive one-third of the payment of \$100,000. In accordance with numerous rulings of my predecessors, I must look to your statement of facts alone for my guidance, and decline to construct a more comprehensive statement out of the documents submitted, and thereon to settle the underlying equities which may exist.

With this principle in view I proceed to answer your questions, discussing so far as necessary the pertinent legal doctrines.

Your first question is, "Have the provisions of the acts of 1894 and 1896 been complied with, and should the certificate to be issued by the Secretary of War under these statutes, and on which payment not yet made is to be made, be now issued?" To which I reply that inasmuch as the act of 1896 necessarily contemplates an extension of time beyond the date fixed by the act of 1894 for the procurement of one of the successive depths and widths of channel, and uses language consistent with an intention to grant a reasonable extension as to other stages of the deepening, and defers the final completion until a date still in the future, and since, under the earlier act, the period of maintenance of maximum width and depth will not expire until January 1, 1900, I am of the opinion that the requirements of the statutes as to time have been sufficiently complied with in respect to the certificate and payment of \$100,000, and that the issu-

ance of the certificate by the proper board may now be authorized or directed by you, provided the report of survey of the work meets your approval.

Your second question is, "To whom should said certificate issue, in case it should be issued at all, i. e., should it issue to C. P. Goodyear, or to the parties to the contracts between Goodyear, Kay, and King, hereinafter mentioned?" It appears that Kay is a third party to the contracts referred to between Goodyear and King. I am of opinion that the word "assigns" in the acts in question is intended to point out the party or parties who take over by formal assignment all rights to or interest in a contract, or such measure of rights and interest as carve out a complete share in the very undertaking itself with all its risks and incidents, and that in any event the assignee recognized must take in accordance with the method and formalities provided by section 3477 of the Revised Statutes. Whatever may be the equitable adjustment of the conflicting interests here, a contract *inter se*, such as the various agreements between the parties in question appears to be, can not operate as an assignment binding on the Government, and no assignment according to the requirements of section 3477 has been filed or seems to exist. And the Government should not, for obvious reasons, construe a contract between third parties or between their contractor and others, or judicially determine the respective rights under such a contract merely for the reason that its terms relate to a Government undertaking; nor may the Government be controlled in its rightful course, or be delayed in the prosecution of the work in hand, because such a contract exists. Section 3477 was enacted to protect the Government from embarrassment, largely in view of such situations as the present one. (*Goodman v. Niblack*, 102 U. S., 556; *Spofford v. Kirk*, 97 id., 484; *United States v. Gillis*, 95 id., 407.)

Similarly, I am of opinion that the phrase "legal representatives" in the act of 1896 refers to those who may be charged with the administration of the contractor's estate, or as equivalent to the "assigns" of the contract as an integral thing, as assignee in insolvency or receiver of the undertaking, either of which classes of persons might be called

on by the Government to complete the work in the event of the death of the contractor or his disability from various causes. While it is true that the statutes recognize generically the assigns of this contractor, I see no reason in that fact for holding that the requirements of section 3477 do not apply. There is to my mind no inconsistency or repugnancy whatever between the two statutes, so that the rule of *United States v. Tymen* (11 Wall., 88, 92) that effect should be given to both acts, if possible, may be fully observed in this case.

Consequently I reach the conclusion that the certificate should issue to C. P. Goodyear as the contractor with the Government named in the act.

Your third question asks whether you would fully perform your duty in this case by issuing a certificate to Mr. Goodyear, which should set out in addition the various facts submitted to you showing the relations of the claimants to each other and their respective interests in and connection with the work. While I think that the issuing of a certificate in such form is fairly within your administrative discretion upon general considerations applicable, and is largely a question of expediency to be determined by yourself, I may suggest that this would be merely to relegate the real question for determination by the Secretary of the Treasury, or, in his choice, for reference again to myself, upon whose discretion and right in the premises, however, I do not intend hereby to place any limitation.

I am not inclined to attach much legal weight to the circumstances of the recognition of J. Floyd King by your Department. It appears to consist chiefly in the formal interchange of certain queries and answers by correspondence, and to have been invited, however unconsciously, by General King's own initiative in his desire for information regarding the progress of the work.

In conclusion, I have no doubt that against the Government itself there is only one valid claim—that of the contractor named in the acts; but, in order to relieve the Government of vexation and delay it may not be amiss to suggest that a just and equitable method of disposing of the conflict of interests, so far as the Government is concerned, and com-

mitting the adjustment between the various claims to arbitration or the proper tribunals would be for all the parties to execute an agreement in the nature of a trust, which shall embody a release to the United States as to the present payment and an agreement to release similarly as to future payments if and when earned and paid, and which shall provide for payment to a trustee for disbursement, first in settlement of established indebtedness, and then for division of profits under the contracts between the parties.

Very respectfully,

JOHN W. GRIGGS.

The SECRETARY OF WAR.

ARMY.

The last proviso of section 6 of the act of April 22, 1898, authorizing the organization of certain forces with special qualifications from the nation at large, not to exceed 3,000 men, contemplates such an organization of 3,000 men for the entire Army, and not the organization of such force under each call for volunteers.

DEPARTMENT OF JUSTICE,

August 1, 1898.

SIR: I have the honor to acknowledge receipt of letter of William H. H. Hart, addressed to you and bearing date of Washington, D. C., July 22, 1898, in reference to your right to accept for service the organization known on the Pacific coast as "Hart's Brigade," and stating that you were willing to have mustered into the service of the United States one regiment California Rangers, mounted riflemen, to serve, if desired, dismounted, the same as the Rough Riders are now serving, and two light batteries of artillery, provided there is law permitting you to take this course. You have referred this letter to me and requested my opinion as to whether, under the last proviso of section 6 of the act of Congress of April 22, 1898, the President is empowered to authorize the Secretary of War to organize exceeding 3,000 men for service in the Army, as contemplated by the said proviso. The proviso is as follows:

"That the President may authorize the Secretary of War to organize companies, troops, battalions, or regiments

possessing special qualifications from the nation at large, not to exceed three thousand men, under such rules and regulations, including the appointment of the officers thereof, as may be prescribed by the Secretary of War."

It is contended in the letter which you have referred to me that the President may authorize you to enlist and organize under this provision of the act as many as 3,000 men under each separate proclamation or call for troops by the President.

I do not think that the provision of the act referred to, when taken in connection with the whole act and its purposes, will bear this construction. The act was passed, as is well known, for the purpose of temporarily increasing the military establishment of the United States in time of war, the imminence of war with Spain being the emergency which gave rise to this legislation. The act was intended to empower the President to raise an army such as, in his opinion, might be necessary to meet this emergency, and the military force called for and organized in obedience to the proclamation of the President under the authority vested in him by the provisions of this act is the army which the act contemplated. It is, in my opinion, a strained construction and one that will not bear the test to say that each proclamation of the President is the basis of the organization of a separate and distinct army. In the outset the President believed that the call for 125,000 men would be sufficient, and thereupon he issued his proclamation stating that that number was desired, and the War Department put into operation the machinery to raise and organize them. Soon thereafter the President felt convinced that 75,000 additional men would be required and he issued his proclamation for this latter number. This second call does not constitute a distinct army, but both calls together, and whatever other calls are made under the provisions of the act, pending the necessity for the temporary increase in the military establishment of the United States, will constitute the army intended by the act.

It is therefore, in my opinion, the proper construction of the provision of the act under consideration to hold that the whole number of men to be enlisted and organized with

special qualifications as authorized in this provision can not exceed 3,000 men. Hence, I advise you that the President is not vested with authority under the provision of law above quoted to authorize the organization of companies, troops, battalions, or regiments possessing special qualifications from the nation at large, beyond the number of 3,000 men in the aggregate.

Respectfully,

JOHN W. GRIGGS.

The SECRETARY OF WAR.

CONSULAR OFFICERS—FEES.

Section 1703, Revised Statutes, allows consular agents all the fees collected, unless there is an order to the contrary limiting the compensation to a part only of the fees received, in which event the residue is added to the income of the principal consular officer.

There is no limitation upon the amount which the agent and the principal officer together shall receive, in case the President makes order for a partition of the fees.

Consular agents are entitled to retain a sum not to exceed \$1,000 annually out of the fees received by them, and the residue is to be paid to and retained by the principal consul, unless such residue, together with similar fees received from other consular agencies or vice-consulates in his territory, does not exceed \$1,000 a year.

The meaning of section 1733, Revised Statutes, being in doubt, it is proper to resort to the construction which has been placed upon it by the State and Treasury Departments, which have to do with its execution. The regulation of a Department of the Government is not to control the construction of an act of Congress when its meaning is plain, but when there has been a long acquiescence in a regulation, and by it rights of parties for many years have been determined and adjusted, it is not to be disregarded without the most cogent and persuasive reasons.

The proposed regulation of the State Department with reference to the compensation of consular agents, being consistent with the provisions of law, may be carried into effect.

DEPARTMENT OF JUSTICE,

August 1, 1898.

SIR: I have given consideration to the matters submitted to me for my opinion by your communication of July 12, wherein you inclosed a proposed Executive regulation of the compensation of consular agents, the material part of which is as follows:

“It is hereby prescribed that consular agents, as compen-

sation for their services to American vessels and seamen and for other official acts, shall receive one-half the official fees collected for such services: *Provided*, such compensation shall not exceed in any fiscal year the sum of one thousand dollars; and all such fees in excess of such compensation shall be remitted to the consul in whose district the agency is located. No other arrangement with consular agents will be allowed."

The question submitted for my opinion is, whether this proposed regulation is consistent with the provisions of law governing the subject of compensation of consular agents. My attention is called by you to the provisions of sections 1703 and 1733 of the Revised Statutes as the law governing this subject. These sections are as follows:

"SEC. 1703. Every vice-consul and vice-commercial agent shall be entitled, as compensation for his services as such, to the whole or so much of the compensation of the principal consular officer in whose place he shall be appointed as shall be determined by the President, and the residue, if any, shall be paid to such principal consular officer; and every consular agent shall be entitled, as compensation for his services, to such fees as he may collect under the regulations prescribed by the President governing the subject of fees, or to so much thereof as shall be determined by the President; and the principal officer of the consulate or commercial agency within the limits of which such consular agent shall be appointed shall be entitled to the residue, if any, in addition to any other compensation allowed him by law for his services therein.

"SEC. 1733. All moneys received for fees at any vice-consulates or consular agencies of the United States, beyond the sum of one thousand dollars in any one year, and all moneys received by any consul or consul-general from consular agencies or vice-consulates in excess of one thousand dollars in the aggregate from all such agencies or vice-consulates, shall be accounted for to the Secretary of the Treasury, and held subject to his draft or other directions."

Section 1703 was first enacted in 1856 as part of the act to regulate the diplomatic and consular systems of the United States.

Section 1733 was enacted in 1868 as a proviso to the act making appropriations for the consular and diplomatic expenses of the Government for the year 1869.

Both sections were carried by the revisers into the Revised Statutes, and consequently must have been supposed by them to be consistent with each other and capable of a construction which would give operation to both.

Section 1703, by the first clause, confers upon consular agents, as compensation for their services, such fees as they may collect. It then goes on to provide, in the alternative, in effect, that the President may determine that they shall receive only a portion of the fees, he having the power to designate the portion. If the President designates that the agent shall receive only a share of the fees, and not the whole, then by the further provisions of this section the residue of the fees goes to the principal officer of the agency within the limits of which the consular agent shall be appointed. Stated in another way, section 1703 allows the agent to receive all the fees collected, provided no order to the contrary is made by the President; if, however, the President, by order, limits the agent's compensation to a part only of the fees received, then his compensation is reduced by that much, and the residue is added to the income of the principal.

This section, standing by itself, has no limitation whatever upon the amount which the agent may receive for himself if the President makes no determination to the contrary, nor any limitation upon the amount which the agent and the principal officer together shall receive in case the President makes order for a partition of the fees.

Section 1733, however, does fix a limit upon the amount which may be received and retained both by consular agents and consuls or consuls-general from consular agencies.

Paragraph 510 of the consular regulations, adopted in 1896, relative to this subject, is as follows:

"Consular agents are entitled, as compensation for their services, to such pay from the Government as their official services to American vessels and seamen may entitle them (par. 520), and to such fees as they may collect under these regulations, or to so much thereof as shall be determined by

the President, not to exceed \$1,000 a year. And the principal officer of the consulate or commercial agency within the limits of which such consular agent is appointed is entitled only to the residue, if any, in addition to any other compensation allowed him by law for his services therein. But all moneys received for fees at any vice-consulates or consular agencies of the United States beyond the sum of \$1,000 in any one year, and all moneys received by any consul-general or consul from consular agencies or vice-consulates in excess of \$1,000 in the aggregate from all such agencies or vice-consulates must be accounted for to the Secretary of the Treasury and held subject to his draft or other directions."

The question of doubt, concerning which you wish my official opinion, is as to the effect of the limitation placed upon the compensation of consular agents by section 1733. Does that section mean that all the fees earned and collected at any consular agency beyond the sum of \$1,000 in any one year shall be accounted for to the Secretary of the Treasury without regard to any order which the President may make with reference to the division of the same between the agent and the principal consul; or does it mean that a consular agent may receive and retain for his compensation a sum not to exceed \$1,000, and that the principal consul may receive as residue the balance of fees so earned and collected, provided that such principal consul shall not, in the aggregate, retain more than \$1,000 from all the agencies or vice-consulates within his territory?

The question is one of doubt arising on the face of the two sections in question. If literally interpreted, section 1733, standing by itself, would have the effect of limiting the total amount of compensation, both to the agent and the principal, to \$1,000 a year, which sum might, under section 1703, be divided between them as the President might determine.

On the other hand, read in connection with section 1703, the provisions of section 1733 might be understood to mean that all moneys received by consular agents as their share of fees under the apportionment of the President in excess of \$1,000 a year should be accounted for to the Secretary of the Treasury.

The construction of the statute, therefore, being one of doubt, it is proper to resort to the construction which has been placed upon these provisions of law by the State Department and by the Department of the Treasury. I am advised that the uniform method of settling the accounts of consuls and consular agents, ever since the adoption of section 1733 in its original form in the act of 1868, has been to allow the agent to retain a sum not to exceed \$1,000 a year out of fees received by him, and to allow the principal consul to receive the residue, provided such residue did not, together with similar fees received from other consular agencies or vice-consulates in his territory, exceed \$1,000 a year. In view of this uniform construction, prevailing now for thirty years, I am unable to say that the law has been erroneously interpreted by the departments.

The effect to be given in the construction of a statute to the practice of the various departments and officers of the Government has been frequently stated in the decisions of the Supreme Court of the United States. In the case of *Robertson v. Downing* (127 U. S., 607-613) it is said:

"The regulation of a department of the Government is not, of course, to control the construction of an act of Congress when its meaning is plain; but when there has been a long acquiescence in a regulation, and by it rights of parties for many years have been determined and adjusted, it is not to be disregarded without the most cogent and persuasive reasons."

In *Edwards's Lessee v. Darby* (12 Wheat., 206-210) it was said:

"In the construction of a doubtful and ambiguous law the contemporaneous construction of those who were called upon to act under the law and were appointed to carry its provisions into effect is entitled to very great respect."

In the case of *United States v. Hill* (120 U. S., 169-182) it is said that where there has been a long practice amounting to a contemporaneous and continuous construction of the statute, in a case where it is doubtful whether the statute requires a return of disputed fees, judges of eminence, heads of departments, and accounting officers of the Treasury having concurred in an interpretation in which

those concerned have confided, a surety on a bond given in pursuance of such statute, as well as his principal, had a right to rely on that interpretation in giving a bond. The courts further say in this last case:

“This principle has been applied, as a wholesome one, for the establishment and enforcement of justice, in many cases in this court, not only between man and man, but between the Government and those who deal with it and put faith in the action of its constituted authorities, judicial, executive, and administrative.”

As a particular instance of the interpretation of this particular statute, which in a collateral way conforms to the view I have above expressed concerning it, I may refer to the decision of the Comptroller of the Treasury (4 Dec. Comp., part 3, p. 546) where the retention of \$1,000 by the consular agent and the payment of the residue of \$1,000 to the principal consul are impliedly approved. Also to the case of *Marston et al. v. United States* (71 Fed. Rep., 496), where the retention by the consular agent of \$1,000 as compensation for a year was approved, notwithstanding the payment of \$665 as residue to the principal consul.

I therefore advise you that the proposed regulation submitted to me is consistent with the provisions of law governing the subject of compensation of consular agents.

Very respectfully,

JOHN W. GRIGGS.

The SECRETARY OF STATE.

STAMP TAX—CHARTER PARTIES.

The paragraph of the war-revenue act of June 13, 1898, relating to charter parties does not apply to vessels engaged in domestic commerce, as the law does not require that their tonnage should be registered.

DEPARTMENT OF JUSTICE,

August 2, 1898.

SIR: I have the honor to acknowledge receipt of yours of July 9th, ultimo, inclosing a letter of the Commissioner of Internal Revenue of July 8, relative to the construction of that part of the war-revenue act under the head of “Charter party.”

You request an opinion on the question presented in the letter of the Commissioner, which is as follows:

"In regard to that paragraph of the revenue act of June 13, 1898, relating to charter parties, the language is as follows:

'Charter party: Contract or agreement for the charter of any ship, or vessel, or steamer, or any letter, memorandum, or other writing between the captain, master, or owner, or person acting as agent of any ship, or vessel, or steamer, and any other person or persons, for or relating to the charter of such ship, or vessel, or steamer, or any renewal or transfer thereof, if the registered tonnage of such ship, or vessel, or steamer does not exceed three hundred tons, three dollars.'

"It is claimed that vessels engaged in domestic commerce are exempt from this requirement, as the law does not require that their tonnage should be registered."

It is as to this question, therefore, that an opinion is requested.

I have recently, at the request of the Commissioner of Internal Revenue, in response to an inquiry by the Lake Carriers' Association, given a memorandum of opinion as follows:

"The law as found in the Revised Statutes, Title XLVIII, the regulation of commerce and navigation, providing for the registry and recording of vessels, applies to such vessels as are required to be registered; and the law in Title L, Revised Statutes, regulation of vessels in domestic commerce, provides for the enrollment of vessels.

"Under Title XLVIII registered tonnage comprises the tonnage of vessels of the United States employed in foreign trade or the whale fisheries, and under Title L enrolled tonnage comprises the tonnage of vessels employed in domestic trade and in trade on the Great Lakes with Canada, over 20 tons, those under 20 tons of this class being termed 'licensed vessels.'

"I am of the opinion that the clause of the war-revenue act under consideration applies only to vessels registered under Title XLVIII, and does not apply to vessels enrolled or licensed under Title L. I think the purpose of the law

was to make this distinction because of the fact that the vessels enrolled and licensed under Title L are engaged in domestic transportation, and it would be a palpable discrimination against them in favor of other methods of domestic or inland transportation to require the tax provided for under the paragraph cited. When the term 'registered tonnage' was used in the act, it could mean, in my opinion, nothing more than to apply the law to such vessels as are required by law to be registered. It is a technical term, and applied to a particular class of vessels known as registered vessels, in distinction from enrolled vessels and licensed vessels."

Upon a further examination of this question I feel fully convinced that the foregoing is the correct interpretation and construction of the provision of the war-revenue act referred to. I am strengthened in the position that the law makes the distinction before stated between vessels of registered tonnage and enrolled vessels, because of the fact that our law, in addition to the registration of vessels of the United States, as provided in Title XLVIII, makes provision by which the registered tonnage of foreign vessels coming into our ports shall be made to conform to that of our own vessels.

By the act of August 5, 1882 (22 Stat. L., ch. 398, p. 300, sec. 2), the following was substituted for section 4154 of the Revised Statutes, which was repealed:

"SEC. 4154. Whenever it is made to appear to the Secretary of the Treasury that the rules concerning the measurement for tonnage of vessels of the United States have been substantially adopted by the government of any foreign country, he may direct that the vessels of such foreign country be deemed to be of the tonnage denoted in their certificates of register or other national papers, and thereupon it shall not be necessary for such vessels to be remeasured at any port in the United States; and when it shall be necessary to ascertain the tonnage of any vessel not a vessel of the United States, the said tonnage shall be ascertained in the manner provided by law for the measurement of vessels of the United States."

This places foreign vessels coming into our ports upon

precisely the same footing as American vessels in respect to registered tonnage, and would subject contracts or agreements for charter made in this country in respect to such foreign vessels to the same tax as such contracts or agreements made or entered into for the charter of American vessels.

Very respectfully,

JAS. E. BOYD,

Assistant Attorney-General.

Approved.

JOHN W. GRIGGS.

The SECRETARY OF THE TREASURY.

PRIZE MONEY.

The officers and men of the U. S. S. *Hawk* are not entitled to prize money for the destruction of the Spanish steamer *Alphonso XII*.

If at the time of her destruction she was a ship or vessel of war in the service of Spain, bounty may be recovered under section 4635, Revised Statutes.

Section 4625, Revised Statutes, relating to prizes, refers only to property actually captured, and not to property which has been destroyed without ever having been actually seized or in the possession of the forces of the United States.

DEPARTMENT OF JUSTICE,

August 2, 1898.

SIR: I have the honor to acknowledge the receipt of your communication of July 20 ultimo, wherein you state for my information certain particulars of the destruction by the U. S. S. *Hawk*, assisted by the U. S. S. *Castine*, on the night of July 4 and the morning of July 5 ultimo, of the Spanish steamer *Alphonso XII*, near Havana. You state that the officers and men of the *Hawk* have presented a claim for prize money under section 4625 of the Revised Statutes, and you desire an expression of my views as to the legality of such claim.

The statutes of the United States, Title LIV, under the head of prize, refer, with some few exceptions, to the capture and condemnation, the sale and division of proceeds, of vessels captured as prize by authority of the United States. From the facts stated in your letter it appears that the *Alphonso XII* was not actually captured by the United States

war ships. The boat which the commander of the *Hawk* sent to take possession was fired upon at its approach and had to retire. The Spanish vessel was assisted in averting capture by the fire of the land batteries, and, as a matter of fact, was not at any time within the possession or control of the United States forces, but was destroyed by their hostile fire on the morning of July 5 last. She was destroyed for the purpose of preventing her cargo from falling into the hands of the enemy.

Section 4625 of the Revised Statutes, under which the claim of the captors is made, in my judgment refers only to property actually captured, and not to property which has been destroyed without ever having been actually seized or in the possession of the United States forces.

I am therefore of the opinion that the claim of the officers and men of the *Hawk* can not be sustained under the provisions of section 4625.

I am further advised by your letter that newspaper reports and other information of a general character indicate that the *Alphonso XII*, at the time of her destruction, was in use as an auxiliary vessel of the Spanish navy, although her precise status is not at present known to your Department. If it be true that the vessel, at the time of her destruction, was a ship or vessel of war belonging to Spain, or in her service, then it is possible that under the provisions of section 4635 of the Revised Statutes the officers and crew of the *Hawk* may be entitled to the bounty provided for by that section. Whether or not the officers and crew of the *Custine* would be entitled to share in such bounty is also a question which I suggest to you, although I express no opinion thereon.

Very respectfully,

JOHN W. GRIGGS.

The SECRETARY OF THE NAVY.

INTEREST—NORTH AMERICAN COMMERCIAL COMPANY.

The North American Commercial Company is liable to the United States for interest upon the sums overdue on account of taxes, rental, and bonus under its lease with the United States.

Where money is due and payable on a contract at a specific time and is withheld, the creditor is entitled to demand and receive interest at the rate prevailing in the forum where suit is brought, except as against the Government of the United States and sovereign States.

In an action for use and occupation or for mesne profits, where the recovery is of a sum in the nature of rent, interest is allowed on each annual sum from the end of the year.

DEPARTMENT OF JUSTICE,

August 2, 1898.

SIR: I have the honor to acknowledge the receipt of your letter of July 22, inclosing a letter from A. K. Tingle, esq., attorney for the North American Commercial Company, lessee of the Pribilof Islands, wherein the question is raised as to the propriety of a demand by the Treasury Department for interest upon the annual sums due from the Commercial Company to the United States on account of taxes, rental, and bonus under the lease between said company and the United States. I am advised by your letter that the exact amount due from the company to the United States for taxes, rental, and bonus under said lease for the years 1894 to 1897, both inclusive, has been paid by the North American Commercial Company and covered into the Treasury, and you desire my opinion as to the right of the Government to demand and collect from the company interest on the several amounts due for said years, respectively.

The lease in question, which bears date March 12, 1890, provides that the annual rental therein reserved, together with all other payments to the United States provided for therein, should be made and paid on or before the 1st day of April of each and every year during the existence of the lease. A dispute having arisen between the United States and the lessee as to what amount, if anything, was due by way of rental, etc., upon said lease for the year ending April 1, 1894, the United States began an action upon contract against the North American Commercial Company in the circuit court of the United States for the southern district of New York on the 25th day of June, 1894, in which it demanded judgment against the defendant, the lessee, in the sum of \$132,187.50, with interest thereon from the 1st day of April, 1894, said sum being the amount

claimed by the Government to be due for the year ending April 1, 1894. To this action the company put in a defense, claiming not only that it owed nothing to the United States, but that the United States was indebted to it in the sum of \$283,725 for damages by reason of the nonperformance by the United States of its obligations under said lease. This suit having been tried before said circuit court a decision was rendered in favor of the United States to the effect that the plaintiff, the United States, was entitled to judgment in the sum of \$94,687.50. The Supreme Court of the United States, to which the case was subsequently taken, modified this judgment in so far as to direct that the amount which the United States should recover was \$76,687.50, with interest thereon from the 1st day of April, 1894, and the Supreme Court directed that judgment in favor of the United States should be rendered upon the defendant's counterclaim. Although statements of the amount claimed by the Government as due under the lease were furnished to the company for each subsequent year after 1894 no action was brought to enforce the Government's demand because the questions in dispute were expected to be settled by the suit to which I have referred. In the year 1894 the company offered to pay to the United States a small proportion of the amount subsequently adjudged to be due by the Supreme Court, but did not actually tender the money nor pay any sum into court, and judgment for interest was allowed by the Supreme Court without question or dispute.

A consideration of the principles upon which interest is allowed upon overdue claims makes it perfectly clear that the company is liable to the United States for interest upon each sum which it now admits, under the principles declared by the Supreme Court, it owed to the United States for rental, etc., upon said lease for each year from 1894 to 1897, inclusive. As I have above stated, the lease provided for the payment of the rental, etc., at a specific date, to wit, on the 1st of April in each year. Whatever money due to the Government the company withheld from it after that date it withheld wrongfully, and receiving and retaining the benefit of it, should, under ordinary principles of justice, be required to pay the legal rate of interest thereon when

making settlement. Interest is defined as the value of the use of money, or the amount of compensation for withholding money. (*Loudon v. Taxing District*, 104 U. S., 771.) It bears the same relation to money that rent does to land, wages to labor, and hire to a chattel. It may be asserted as a universal principle of legal practice in America, as against all parties except the United States Government and sovereign States, that where money is due and payable on a contract at a specific time and is withheld the creditor is entitled to demand and receive interest, at the rate prevailing in the forum where a suit is brought, from the due date of the claim. As particular instances applicable to the present case, I may cite numerous cases collected in 1 Sedgwick on Damages, section 307, to the effect that where rent due by agreement is not paid, interest may be recovered on the amount from the day on which it should have been paid. So in an action for use and occupation, or for mesne profits, where the recovery is of a sum in the nature of rent, interest is allowed on each annual sum from the end of the year.

I perceive nothing in the letter of the counsel of the North American Commercial Company, transmitted to me with your communication, which suggests any reason for varying the application of this principle. It is claimed in that brief that the company made no default in payment; that it tendered the amount due according to previous settlements made by competent authority and approved by the law officers of the Government; that the tender was refused and an unjust demand made by the Department. Whether or not all this is true is immaterial. The truth is that the company did owe to the United States a certain specific sum much greater than the sum it offered to pay. The tender of a less sum than that actually due was tantamount to no tender at all, and had no legal effect whatever. Interest is not allowed upon the basis of a penalty for lack of good faith or promptness, but as compensation to the creditor. The company has had the use for several years of large sums of money which it owed to the United States. For the same period the United States has been deprived of the use of this money. It is neither unjust nor unlawful for the

United States to demand that it shall receive from the company, by way of interest, compensation for its deprivation of the use of these sums, and it is no just ground of complaint on the part of the company that it is required to make compensation to the United States for the use of the money which it unfawfully retained.

Very respectfully,

JOHN W. GRIGGS.

The SECRETARY OF THE TREASURY.

ARMY OFFICERS—AGE LIMIT.

The law fixes no age limit for officers in the Volunteer Army.

An officer of the Regular Army, holding at the same time a commission as a general in the Volunteer Army, may continue to hold and exercise his commission in the Volunteer Army after having been placed upon the retired list by reason of the age limit.

DEPARTMENT OF JUSTICE,

August 3, 1898.

SIR: In response to your request, under date of July 14, 1898, for my opinion as to whether an officer of the Regular Army, upon reaching the age limit of 64 years, and being retired from active service, pursuant to the act of June 30, 1882 (22 Stats., 118), shall thereby also cease to perform active military service in the Volunteer Army of the United States under a commission issued by the President, pursuant to the provisions of the act of April 22, 1898, "To provide for temporarily increasing the military establishment of the United States in time of war, and for other purposes," I have the honor to advise you as follows:

The act of April 22, 1898, above referred to, provides that the Regular Army is the permanent military establishment which is maintained both in peace and war according to law. The statutes governing the organization of the Regular Army, its composition, the qualifications, grade and rank of its officers, the method of their promotion and retirement, are found in the Revised Statutes, Title XIV, supplemented by such amendments as have been passed since the compila-

tion of the Revised Statutes. The same act of April 22, 1898, further provides, in section 2:

"That in time of war the Army shall consist of two branches, which shall be designated respectively as the Regular Army and the Volunteer Army of the United States."

Section 11 of the same act authorizes the President to appoint in the Volunteer Army, by and with the advice and consent of the Senate, not exceeding one major-general for each organized army corp and division, and one brigadier-general for each brigade, and specifically directs that any officer so selected and appointed from the Regular Army shall be entitled to retain his rank therein. From this last provision it appears that the same person may hold a commission of one grade in the Regular Army, and a commission as a major-general or brigadier-general in the Volunteer Army at the same time.

The law fixes no age limit for officers in the Volunteer Army, so that it is competent for the President to appoint, as a major-general or brigadier-general in the Volunteer Army, a person above the age of 64 years. Such appointments may be made from civil life, or may be made from the commissioned officers of the Regular Army. An officer of the Regular Army, holding a commission therein, may resign or be placed upon the retired list without in any way impairing his right or qualification to serve in the Volunteer Army. The fact that an officer has reached the age limit and is retired as an officer in the Regular Army, does not appear in any wise to be inconsistent with his continuing to hold a valid and live commission in the Volunteer Army. I can find no provision in the statutes, nor do I perceive any reason to advise you, therefore, otherwise than that an officer of the Regular Army, holding at the same time a commission as a general in the Volunteer Army, may continue to hold and exercise his commission in the Volunteer Army after having been placed upon the retired list by reason of the age limit.

Very respectfully,

JOHN W. GRIGGS.

The SECRETARY OF WAR.

WAR-REVENUE TAX.

Where words are sometimes used in different senses, their meaning in a statute must always be construed in reference to the subject-matter of the enactment.

The terms "goods," "goods and chattels," and "goods, wares and merchandise" have no invariable fixed meaning in legal construction. The term "goods" as used in the war-revenue act of June 13, 1898, includes money.

DEPARTMENT OF JUSTICE,
Washington, D. C., August 17, 1898.

SIR: In response to your request, under date of July 25 ultimo, for my opinion as to whether or not the word "goods," as used in the war-revenue act of June 13, 1898, includes money, I have the honor to advise you as follows:

The question arises under the following paragraph, contained in Schedule A of said act:

"Express and freight: It shall be the duty of every railroad or steamboat company, carrier, express company, or corporation or person whose occupation is to act as such, to issue to the shipper or consignor, or his agent, or person from whom any goods are accepted for transportation, a bill of lading, manifest, or other evidence of receipt and forwarding for each shipment received for carriage and transportation, whether in bulk or in boxes, bales, packages, bundles, or not so enclosed or included; and there shall be duly attached and canceled, as is in this act provided, to each of said bills of lading, manifests, or other memorandum, and to each duplicate thereof, a stamp of the value of one cent."

The word "goods" and the terms "goods and chattels" and "goods, wares, and merchandise" have no invariable fixed meaning in legal construction. Their interpretation varies according to the circumstances in which they are used. The word "goods" sometimes has a very broad meaning, comprehending everything that would be included in the term personal property. In some senses it is very restricted, describing merely, for instance, a stock of merchandise in a store. When used in the latter sense it would not include movable fixtures, nor the safe, nor the scales, nor the horses and wagons and other paraphernalia used for

carrying on the business. The use of the term varies in comprehensiveness between these two extremes. Undoubtedly, in many constructions, the word "goods" includes money. Under a common-law execution directing the sheriff to make of the goods and chattels of the defendant a certain sum, the sheriff can properly levy upon and take money of the defendant. (*Turner v. Fendall*, 1 Cranch, 117).

In *Sewall v. Allen* (6 Wendall, 335, 355), it is said "there can be no doubt that bank bills, under certain circumstances, and for certain purposes, are considered and treated as goods. They are subject to execution, and also pass as goods to executors and administrators, and to the assignees of bankrupts." In the same case it was said by *Chancellor Walworth* :

"For all civil purposes, and especially in the United States, where they constitute (1830) nearly the whole circulating medium of the country, bank bills are considered and treated as money, and therefore come within the general term goods."

The rule of construction to be followed in these cases is nowhere better stated than in the same opinion of *Chancellor Walworth* above referred to. He says :

"Where words are sometimes used in different senses, their meaning in a statute must always be construed in reference to the subject-matter of the enactment." (*Sewall v. Allen*, 6 Wend., 335.)

Applying this rule of construction to the language of the war-revenue act above quoted, it is not difficult to determine the subject-matter of the enactment. The subject-matter is comprised in the heading to the paragraph quoted, namely, "Express and freight." It was the manifest purpose of Congress to impose a stamp tax upon the shipment and transportation of such material substances as, under commercial usage at the present time, are the subjects of transportation by railroad and steamboat companies, express companies, and corporations or persons whose occupation is to act as such. There is in practice and principle no difference whatever, commercially and legally, between the transportation by a common carrier of money and the transportation of ordinary merchandise. It is the general custom at

this time for express companies to accept and transport for pay, as common carriers, packages containing "goods" in the more liberal acceptation of the term, including coin, bank bills, stock certificates, commercial paper, and other choses in action. No reason is perceived why Congress should have intended to apply a stamp tax to the transportation of merchandise in the ordinary acceptation of the term, and to have allowed the express companies to transport money or evidences of indebtedness, or other papers or documents not falling within the restricted meaning of the term "goods," without the payment of the tax. The principle on which the tax is levied applies equally and generally to all packages, no matter what they contain, accepted by the companies for transportation. It seems clear that Congress meant to impose the tax upon all things received and transported as express or freight matter, and the word "goods" was used to comprehend and include everything of that description. When money is sent by express it is carried in bulk, in bags or packages. Its transportation does not differ from the method followed in transporting other valuable packages.

In the case of the *Schooner Elizabeth and Jane* (2 Mason C. Cls., 407) it was held by *Mr. Justice Story* that silver dollars were "goods, wares, and merchandise" within the meaning of the revenue act of March 3, 1799, chapter 128, for the landing of which a permit from the custom-house was necessary. In that case it is said:

"It can not be doubted that money, and of course foreign coin, falls within the description of goods at common law; and coin, dollars, and bullion are considered in commercial transactions as 'goods and merchandise,' and may be insured as such in a policy of insurance. In point of fact, too, dollars are often imported as 'wares and merchandise'—that is to say, as property, not to pass merely as currency, but to be bought and sold as a marketable commodity at varying prices. Unless, therefore, there is something in the context of the statute from which it can be inferred that the legislature did not use the words in their ordinary import, I think I am bound to interpret them in that sense."

Both upon principle and the authority of the decided

cases, I am of the opinion, therefore, that the term "goods" used in the act above quoted includes money.

Respectfully,

JOHN W. GRIGGS.

The SECRETARY OF THE TREASURY.

OPINIONS—TOBACCO PACKAGES.

The question whether a proceeding under any law would or would not be successful, is a judicial question on which it is not necessary or proper for the Attorney-General to give an official opinion.

A doubt existing as to the right of the Government to exclude from packages of manufactured tobacco, cigars, cigarettes, etc., everything, except the wrapper, label, and stamps under the act of July 24, 1897, a case should be presented to the courts to test the question.

DEPARTMENT OF JUSTICE,

August 19, 1898.

SIR: I have the honor to acknowledge receipt of your letter of the 9th instant asking to be advised whether the prohibition contained in section 10 of the tariff act of July 24, 1897, purporting to amend Revised Statutes, section 3394 as amended, can be enforced under Revised Statutes, section 3456, or under any other law relating to the subject. The prohibition in question is as follows:

"None of the packages of smoking tobacco and fine-cut chewing tobacco and cigarettes prescribed by law shall be permitted to have packed in, or attached to, or connected with them, any article or thing whatsoever, other than the manufacturers' wrappers and labels, the internal-revenue stamp and the tobacco or cigarettes, respectively, put up therein, on which tax is required to be paid under the internal-revenue laws; nor shall there be affixed to, or branded, stamped, marked, written, or printed upon, said packages, or their contents, any promise or offer of, or any order or certificate for, any gift, prize, premium, payment, or reward."

Section 3456, Revised Statutes, which is one of the provisions of the internal-revenue laws common to several objects, omitting such of the said section as is not pertinent to the inquiry in hand, is as follows:

"If any * * * manufacturer of tobacco or cigars shall

knowingly or willfully omit, neglect, or refuse to do or cause to be done any of the things required by law in the carrying on or conducting of his business, or shall do anything by this title prohibited, if there be no specific penalty or punishment imposed by any other section of this title for the neglecting, omitting, or refusing to do, or for doing or causing to be done the thing required or prohibited, he shall pay a penalty of one thousand dollars; and if the person so offending be * * * a manufacturer of tobacco or cigars, all tobacco or cigars found in his manufactory shall be forfeited to the United States."

The first question which arises is as to whether this is a case in which the Attorney-General is authorized by law to give an opinion. The question presented, in some respects, is not one arising in your Department, but belongs more properly to this Department and the courts of justice, and the inquiry whether a proceeding under section 3456, or under any other law, would or would not be successful is a judicial question on which it is not necessary or proper for me to give an official opinion. (20 Opin., 702.)

However, I regard the matter as one of such importance that I do not think proper to dismiss it without making a suggestion that it be tested as early as practicable in the courts. This legislation undoubtedly involves several important legal questions, which I think should be passed upon by the courts before an effort is made to put it into general execution.

It is not apparent to me that this paragraph in any way affects the collection of taxes upon manufactured tobacco, and it is probable that Congress had another object in view in its enactment. The latter part of the paragraph quoted seems to indicate that the intention of the act was to exclude from packages of manufactured tobacco, cigars, and cigarettes, things which were, in the judgment of Congress, immoral or in some other like way objectionable. Now, Congress has the power, in connection with the manufacture and sale of tobacco, aside from the regulation of interstate commerce in that article, to provide for the collection of internal-revenue taxes therefrom; but this law is aimed at the sale, gift, or distribution, without any reference to

interstate commerce, of articles accompanying packages of manufactured tobacco. There is at least plausible ground upon which to base the contention that such restriction of private rights is not authorized by the Constitution. The power to collect revenue from specific articles does not necessarily imply a power to regulate the business of citizens with regard to other subjects. It is a question which admits of much doubt, whether Congress, when it enacts laws for the purpose of raising revenue from the business of manufacturing and selling tobacco, is warranted in enacting in connection therewith legislation to protect the morals of the people. It has been held by the Supreme Court of the United States in the case of *United States v. E. C. Knight Company* (156 U. S., 1) that these matters belong exclusively to the States.

Aside from this, the paragraph quoted presents some difficulties in the way of the effectual enforcement of its provisions by seizures, fines, or the like. Penal statutes, according to the fundamental principles, should clearly prescribe the offense and its punishment and point out the offender, so that a man may not be condemned for an act which he reasonably supposes himself at liberty to commit with impunity.

I would suggest, therefore, that the Commissioner of Internal Revenue cause to be instituted through some one of the collectors a proceeding by which the validity and scope of this law can be tested in the courts. A seizure of packages containing the prohibited articles can be made and a criminal warrant issued against some manufacturer or other person who is alleged to have violated the provisions of the paragraph, and thus a case can be brought before the courts and the questions involved judicially determined.

Respectfully,

JAMES E. BOYD,
Assistant Attorney-General.

Approved.

JOHN W. GRIGGS.
The SECRETARY OF THE TREASURY.

OFFICE—COMPENSATION.

The circuit judge appointed as a commissioner under the convention of February 8, 1896, with Great Britain, is entitled to compensation additional to that of his salary, notwithstanding Revised Statutes, sections 1763 and 1765, and the act of July 31, 1894, section 2.

This law should not be regarded as enacted by Congress to invade the domain of the treaty-making authority and establishing restrictions upon future occasional and temporary commissionerships created by international agreement, the nature and functions of which neither Congress nor the framers of Article II, section 2, of the Constitution, could wisely undertake or foresee.

Semble: The word "office," as used in section 2 of the act of 1894, is to be presumed, in the absence of indications to the contrary, not to embrace such commissionership, because it is not what is called a constitutional office.

DEPARTMENT OF JUSTICE,

August 18, 1898.

SIR: I have your letter of the 13th instant, asking my opinion upon the question whether Hon. William L. Putnam, United States circuit judge, who was appointed and has acted as one of the two commissioners under the convention of February 8, 1896, concerning claims growing out of seizures of vessels in Bering Sea, can be paid by you for his services as such commissioner.

Your attention, it appears, has been called to R. S. 1765, 1763, and the Dockery law. (2 Supp. Rev. Stat., 212.)

The provision of the Dockery law referred to is as follows:

"No person who holds an office the salary or annual compensation attached to which amounts to the sum of two thousand five hundred dollars shall be appointed to or hold any other office to which compensation is attached unless specially heretofore or hereafter specially authorized thereto by law."

Article 7 of the treaty of 1896 is as follows:

"Each Government shall provide for the remuneration of the commissioner appointed by it.

"The remuneration of the umpire, if one should be appointed, and all contingent and incidental expenses of the commission, or of the umpire, shall be defrayed by the two Governments in equal moieties."

The treaty article 3 speaks of the two commissioners as

constituting a commission, and article 1 provides that the two parties agree to refer all claims growing out of seizures of British vessels in Bering Sea to two commissioners, one to be appointed by the President, one by the Queen. The duties of the commissioners are confined to fairly and impartially investigating and deciding upon the claims, jointly, and jointly reporting any disagreement; upon which, an umpire is to be chosen.

On May 7, 1896, Congress passed a law appropriating \$75,000, "to be expended, under the direction of the Secretary of State, with the approval of the President of the United States, in fulfilling the stipulations of the treaty." This language evidently referred to article 7, and did not provide for the payment of the claims.

The question is whether the act of 1894 applies to the commissioner and prevents the payment to Judge Putnam of compensation from the \$75,000 because it forbids the appointment to or holding of a second "office to which compensation is attached."

Article II, section 2 of the Constitution, establishing the executive branch of the Government, provides:

"He [the President] shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur; and he shall nominate, and by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law; but the Congress may by law vest the appointment of such inferior officers as they think proper in the President alone, in the courts of law, or in the heads of departments."

It would seem that the phrase "which shall be established by law" was conceived as referring to the power of Congress to pass laws necessary and proper to carry into effect all the powers granted in the Constitution, and that there was no expectation that the "officers of the United States" would be established by treaties between the United States and other countries. The commissionership in question is

not an office established by law in that sense. Neither does it seem to be within the clause "ambassadors, other public ministers and consuls;" for their offices were adopted from the law of nations, and exist independently of statute or treaty. (7 Opin., 242.) The commissioner is, of course, not one of the officers "whose appointments are herein otherwise provided for."

In short, the office, if it be an office, is not one of those appointment to which is required by the Constitution to be made in the ways enumerated in Article II, section 2.

The treaty, to which the commission and commissionership owe their existence, provides that the President (saying nothing of the Senate) shall appoint; but, although this produces a resemblance to the Constitutional requirement, the commissionership is none the more, on that account, an office known to the Constitution as such. It is an office or employment emanating from the general treaty-making power, and created by it and Great Britain. In the case of *United States v. Germaine* (99 U. S., 510), the Supreme Court say:

"That all persons who can be said to hold an office under the Government about to be established under the Constitution were intended to be included within one or the other of these modes of appointment (those of Article II, section 2), there can be no doubt. * * * If the punishment were designed for others than officers as defined by the Constitution, words to that effect would be used, as servant, agent, person in the service or employment of the Government; and this has been done where it was so intended, as in the sixteenth section of the act of 1846, concerning embezzlement, by which any officer or agent of the United States, and all persons participating in the act are made liable."

In the series of statutes to which the act of 1894 belongs—Revised Statutes 1763, 1764, 1765—it will be observed that the language of the Supreme Court finds further confirmation; for after speaking of officers they add words to include persons serving the Government in other or doubtful capacities.

It is true that the statutes referred to were criminal; but, while this may be a reason for not confining the word office

in civil statutes to a strict construction, yet what the Supreme Court says seems to indicate that, where, as in this series, that word is used and followed by other designations, the line of cleavage is that between constitutional and nonconstitutional offices. (See *United States v. Mouat*, 124 U. S. 307.)

It would seem, therefore, that the word office in the act of 1894 is to be presumed, in the absence of indications to the contrary, not to embrace such a commissionership, because not what is called a constitutional office. But this may not be so; and therefore it is well to consider that, in addition to the constitutional, there is the legal and the popular sense of the word office.

The legal definitions of a public office have been many and various. The idea seems to prevail that it is an employment to exercise some delegated part of the sovereign power; and the Supreme Court appears to attach importance to the ideas of "tenure, duration, emolument, and duties," and suggests that the last should be continuing or permanent, not occasional or temporary. In case cited it was further said: "The surgeon is only to act when called upon by the Commissioner of Pensions in some special case, as when some pensioner or claimant of a pension presents himself for examination;" and this was regarded as making his duties "occasional and intermittent."

Whether this commissioner, sent to adjudicate upon certain named claims, listed at the end of the treaty, whose employment was thus to perform a certain task which might take a month or several months, would answer the right legal definition of an officer, must be regarded as at least doubtful. He resembles a special assistant to a district attorney, to aid in a certain case or set of cases, who has been recognized as not an officer, although a regular assistant is an officer. No "emolument" was attached to his employment by the treaty or act of May, 1896, but the former signified no more on that point than that he was to be paid by the United States, if at all, and the latter, while appropriating money to be used in carrying out article 7, left the President and Secretary free to pay or not to pay the commissioner, as might be arranged. I am not prepared to say,

however, that, if nothing else were lacking to make him an officer of the United States—and we may assume that only officers of *the United States* were in the mind of Congress in 1894—it would be easy to establish that the commissioner could be paid out of the \$75,000 and yet be regarded as holding an employment to which no “emolument” belonged. It does seem, however, that the temporary character of the employment, which was to consist of and to terminate at the end of the examination of a limited number of specified claims, withdraws one of the elements of an office which the Supreme Court regards as essential. (*Auffmordt v. Hedden*, 137 U. S., 327.)

As for the popular language, it seems clear that a person employed solely as a sworn judge of a joint international commission would not be spoken of as an officer of either country, although, under a treaty requiring it, selected and sent to his post by one of them.

For these reasons, it seems to me that this act of 1894, passed anterior to the treaty as a supplement to a series of acts which first concerned only collectors of customs, naval officers, and surveyors, and was afterwards extended to other officers, should be regarded as not intended by Congress to invade the domain of the treaty-making authority and establish restrictions upon future occasional and temporary commissionerships created by international agreement, the nature and functions of which neither Congress nor the framers of Article II, section 2, could wisely have undertaken to foresee. The treaty in this case might have provided for the appointment of an identical commissioner by our Ambassador to Great Britain, or by the President of France, instead of by the President of the United States, and might, for reasons important to the two treaty-making authorities, have expressly required one of the judges of the Supreme Court to be appointed. With such matters, it seems to me, Congress, by the act of 1894, had no intention of interfering. If within the letter, such an employment seems to be beyond the intent of that law.

It has been a useful custom of the Government for a century to assign to special work of great international importance eminent judges—Ellsworth, Jay, Nelson, etc.—while

it has been no part of our policy to require services for the public without pay, theoretically amounting to just compensation.

What I have said seems to have been the executive interpretation of the word office; for, Mr. Senator Morgan was appointed and paid as a member of the fur-seal arbitration tribunal, although while a Senator he aided in creating that "civil office," and Mr. Justice Brewer and Judge Alvey, since this act of 1894, have been appointed upon the commission to report upon the divisional line between Venezuela and British Guiana, all being compensated out of general appropriations for the expenses.

While, therefore, the question is not free from difficulty, I am inclined to the opinion that Judge Putnam can be paid a sum additional to his salary as judge.

I do not regard Revised Statutes 1763 and 1765, to which you refer me, as applicable to the case. If not an office, the commissionership was a distinct place, position, or employment, having nothing to do with the duties of the judgeship and compatible therewith, to which position no superior authority could detail Judge Putnam. *U. S. v. Mullett*, 150 U. S., 566, and cases cited.

Respectfully,

JOHN W. GRIGGS.

The SECRETARY OF STATE.

OPINIONS—REVENUE-CUTTER SERVICE.

The facts submitted failing to raise the question of the legal status of the Revenue-Cutter Service, additional information is requested.

DEPARTMENT OF JUSTICE,

August 24, 1898.

SIR: I am in receipt of your letter of August 19, with its inclosures, in which you request my opinion on the question whether the service of one Charles Whitman, who served on the revenue steamer *Johnson* from May 1 to October 7, 1871, was that of a civilian employee or as an enlisted man in the Army or Navy. The question is put in view of the provisions of section 1754, Revised Statutes, granting a preference

for appointments to civil offices to persons honorably discharged from the military or naval service by reason of disability resulting from wounds or sickness incurred in the line of duty. I have the honor to state in reply that the facts stated do not raise the question of the legal status, viewed generally, of the Revenue-Cutter Service, as suggested in the inclosures, but raise at the present stage two questions of fact, viz: What was the nature or character of the service rendered by said Whitman and was it undertaken by enlistment or otherwise, and did the physical disability for which he was discharged result from wounds or sickness incurred in the line of duty? Upon receipt of information upon these points I shall be pleased to comply with your request.

I return the accompanying papers herewith.

Respectfully,

JOHN W. GRIGGS.

The SECRETARY OF THE TREASURY.

CUBA—WAR—SUPPLIES.

Notwithstanding the signing of the protocol and the suspension of hostilities, a state of war still exists between this country and Spain, as peace can only be declared pursuant to the negotiations between the authorized peace commissioners.

In the distribution of supplies to the destitute inhabitants of Cuba, the commanding officers may use either the officers of the Army or such other volunteer agencies as may be available for the purpose.

The field of their operations is not necessarily restricted to the territory over which they exercise actual control.

DEPARTMENT OF JUSTICE,

August 24, 1898.

SIR: I have the honor to acknowledge the receipt of your communication of the 23d instant, calling my attention to the provisions of section 1 of the act entitled "An act to provide assistance to the inhabitants of Cuba, and arms, munitions, and military stores to the people of the island of Cuba, and for other purposes," approved May 18, 1898, and requesting my opinion for the guidance of the War Department as to the proper construction of this act in certain particulars hereinafter mentioned.

The section referred to reads as follows:

"That while serving in Cuba during the existing war, officers of the Army of the United States exercising separate commands may, by special order, cause subsistence, medical, and quartermaster's supplies to be issued to, and other aid rendered to, inhabitants of the island of Cuba who are destitute and in imminent danger of perishing unless they receive the same."

The first matter of doubt to which you direct my attention relates to the meaning of the words "while serving in Cuba during the existing war." While you do not so state, I assume that your doubt arises as to whether there is a status of war between the United States and Spain at the present time, the protocol providing for the cessation of hostilities and the appointment of commissioners to negotiate peace having been signed on the 12th of August instant.

Notwithstanding the signing of the protocol and the suspension of hostilities, a state of war between this country and Spain still exists. Peace has not been declared and can not be declared except in pursuance of the negotiations between the peace commissioners authorized by the protocol. In my judgment, therefore, so far as this question is concerned, the act is still operative.

The next question suggested is whether the War Department, under this act, can send officers of the Army and others into districts of the island of Cuba where the United States has no army and does not exercise any military or other control, for the purpose of distributing supplies to the inhabitants of the island of Cuba who are destitute and in imminent danger of perishing unless they receive the same.

The manifest object of the act was to render relief to destitute inhabitants of the island of Cuba. The whole island is comprehended within the meaning of the statute. The means designated by Congress for effecting this purpose is through the employment of officers of the United States exercising separate commands while serving in Cuba. These officers are to act only in pursuance of special orders, by which, no doubt, is meant orders from the Commander in Chief, through the War Department. This provision of the statute will be complied with if the Secretary of War

will direct any officer of the United States exercising a separate command in Cuba to cause subsistence, etc., to be issued to, and other aid rendered to, the destitute inhabitants of Cuba. No restriction is placed by the act upon the means by which such officers shall cause subsistence to be rendered. In making distribution of supplies, the commanding officers may use either the officers of the Army or such other volunteer agencies as may be available for the purpose.

The field of their operations will not necessarily be restricted to the territory over which they exercise actual control. In theory, if not in actual fact, the whole island of Cuba is subject to the military domination of the United States, the Spanish Government having agreed to immediately evacuate the island. The only difficulties to be encountered will be physical difficulties in carrying out the purpose of the act. I see no legal difficulties in the way.

Very respectfully,

JOHN W. GRIGGS.

The SECRETARY OF WAR.

TAXES—CONTRACT.

The word "goods" includes money, securities, and other choses in action.

When the Government enters into an agreement with a citizen it is not acting in its capacity of a sovereign, but places itself on the level with an ordinary individual, and its contracts have the same meaning as those between private persons.

The provision of the Federal Constitution forbidding the impairment of contracts, applies only to the States and not to acts of Congress.

The constitutional requirement with reference to uniformity in the imposition of taxes, imposts, etc., is satisfied when a particular impost is uniform upon all subjects of the same kind or class.

So long as a contractor is taxed uniformly with all others in the same line of business, upon the same transactions, and the tax is levied for proper objects of taxation, he can not complain merely because his compensation or profits under his contract with the Government are thereby indirectly reduced.

The bill of lading, manifest, or receipt issued to the consignor by the United States Express Company when receiving money and securities for transportation under its contract with the Government, must have attached a revenue stamp duly canceled.

DEPARTMENT OF JUSTICE,

August 26, 1898.

SIR: By contract entered into March 1, 1889, between the United States by the Secretary of the Treasury, and the United States Express Company, the United States agreed to employ the said company exclusively as its transportation agent for the transportation of all moneys and securities belonging to the United States within certain territorial limits in the contract specified. The contract fixes the rate of compensation to be paid to the company for the transportation of each kind of money, coin, paper currency, bonds, certificates, canceled securities, and mixed packages of currency and coin. The contract is terminable on six months' notice in writing by either party to the other and is still in force.

You submit for my decision the question whether under the war-revenue act of June 13, 1898, the United States Express Company is required, when receiving money and securities for transportation for the Government, under this contract, to issue to the consignor a bill of lading, manifest, or other receipt with a 1-cent stamp duly attached and canceled.

It is contended by counsel for the express company that moneys and securities transported by it under this contract are exempt from the provisions of the act in question for two reasons:

First. Because the act applies in terms to "goods," and moneys and public securities such as are described in the contract are not "goods" within the meaning of the act. I have already, in my opinion of August 17, 1898, decided that the word "goods" used in this connection includes money, securities, and other choses in action.

Second. It is claimed in behalf of the express company that, in view of the fact that the amount of its compensation for carrying each shipment had been determined and agreed upon in advance, the imposition by the Government through this act of Congress of a stamp tax upon each shipment is in effect a reduction of the compensation reserved to the company, and an impairment to that extent of the obligation of the contract, amounting to a violation of the

contractual obligation of the Government, and in fact an arbitrary and oppressive act under the guise of taxation.

When a government enters into such an agreement, it is not acting in its capacity of a sovereign, but it comes down to the level of an ordinary individual. Its contracts have the same meaning as that of similar contracts between private persons. (*Murray v. Charleston*, 96 U. S., 432, 445.)

The provision of the Federal Constitution which forbids the passage of any law impairing the obligation of contracts applies only to the States; there is no such prohibition expressly made in relation to acts of Congress. It is unnecessary to discuss the question whether Congress has unrestricted power to do what the States can not do in the impairment of contract obligations. It is probable it would be held that in some instances and for some purposes it can. Such an instance might be the enactment of a bankrupt law, which necessarily implies the impairment and even the entire discharge of contract obligations. (*Miller on Constitution*, 529.)

It is not improbable, however, that any act of Congress which should provide for the repudiation of any substantial part of a valid contract would be obnoxious to those other provisions of the Federal Constitution which are intended to protect the citizen and his property against arbitrary seizure and confiscation.

But, in my judgment, there is no just ground to consider that the imposition of the stamp tax upon the United States Express Company by the act mentioned either impairs the obligation of its contract or takes private property for public use without compensation or without due process of law. While the imposition by way of stamp duty is commonly called a tax, nevertheless, considered in the light of the constitutional provision which regulates the levy of such taxes, it is not strictly a tax, but an impost.

The Constitution declares that "the Congress shall have power to lay and collect taxes, duties, imposts, and excises; * * * but all duties, imposts, and excises shall be uniform throughout the United States." (Art. I, sec. 8.)

This constitutional quality of uniformity pertains to this particular piece of legislation. The law provides that "it

shall be the duty of *every* railroad or steamboat company, carrier, express company, or corporation or person whose occupation is to act as such, to issue to the shipper or consignor, or his agent, or person from whom any goods are accepted for transportation, a bill of lading, manifest, or other evidence of receipt and forwarding for *each* shipment received for carriage and transportation; and there shall be duly attached and canceled, as is in this act provided, to *each* of said bills of lading, manifests, or other memorandum, and to *each* duplicate thereof, a stamp of the value of 1 cent."

It satisfies the constitutional requirement of uniformity, when a particular impost is uniform upon all subjects of the same kind or class. Such is the character of this particular levy. It extends to all cases where goods are received for transportation by express companies, no matter whether the consignor be a municipality, a State, or the Federal Government itself, and without regard to whether such goods are received and transported under a continuing contract previously entered into, or under the ordinary obligation of a common carrier to take and transport the goods of all who apply and tender reasonable compensation.

No difference is perceived in the effect of this law in its operation upon the United States Express Company where it transports goods for the Government under this contract, and those instances wherein this or other companies are under similar contract with private persons at fixed rates established prior to the passage of the act and continuing during its operation. If the obligation of the contract is impaired in one case it is in the other. It would terminate the power of the Government to levy taxes and imposts if individuals were allowed to set up the plea that thereby their contracts were rendered less profitable than before, or even that their profits were more than balanced by the governmental exactions. The payment of taxes in any form is not supposed to contribute to the profits of the subject, but to swell the funds of the Government. Taxes may be ruinous, but they for that reason are not unlawful. The power to tax is the power to destroy. (Marshall, Ch. J., *McCullough v. Maryland*, 4 Wheat., 431.) Counsel for the express company does not contend, as I understand his brief,

that if this contract were between the company and a private firm or person the impost laid by the Government would afford any ground of complaint against the validity of the tax or the continuing force of the contract as between the parties. The act would be valid and would have to be complied with.

But he urges that because, in fact, the impost is laid by the Government acting through its legislative department upon business done under a contract to which the Government in its capacity as a proprietor is a party, therefore the Government is exercising an arbitrary and unjust power in its own favor to the injury of the other party to the contract.

No doubt an act of Congress which should single out any individual with whom it had contractual relations and impose upon him or upon his especial business new and peculiar exactions by way of tax or impost, whereby the value of his contract was impaired and the compensation reserved to him under the contract to be paid by the Government was either directly or indirectly reduced in a material degree, would violate fundamental principles of justice. It can not be supposed that Congress would pass such an act. This case is not of that kind. The impost is not peculiar to this company nor to its business. It is general, uniform, and has no exceptions. It applies to all cases where previous contracts exist between the company and its shippers. It does not assume to nor does it in fact violate or impair a single condition of the contract. It does not authorize the Treasury Department to withhold the sums due under the contract to meet the dues to the Government, as was the case in *Murray v. Charleston* (96 U. S., 432). The full amount of the agreed compensation will be paid to the company by the Government as it would have been had the war-revenue act never been passed. The act merely imposes upon the company a duty as to the issue of a receipt and the cancellation of a stamp, which are the methods for securing the payment of the impost intended to be laid for the high purpose of sustaining the Government in time of war.

No case is cited nor do I know of any principle or decision which is in the remotest degree authority for the position

that a government having the power to tax can not exercise it upon ordinary subjects of taxation, either property or business, which are under contractual relations to the Government. Could it be contended that a government could not tax a building which it occupied as a tenant because the payment of the tax would lessen the owner's net income from the rent? In levying an income tax would it be unjust or unconstitutional to tax the income derived by a citizen from a contract to erect a public building, or dredge a river, or transport troops? The immediate answer would be in the negative. And yet every objection urged against this exaction of a stamp impost upon this particular business of the United States Express Company could be with equal applicability urged against the Government in each case I have suggested.

So long as the contractor is taxed uniformly with all others in the same line of business, upon the same transactions, and the tax is levied for appropriate objects of taxation, he can not complain merely because his compensation or profits under his contract with the Government are thereby indirectly reduced. The contract is not affected. The business of the contractor is taxed, and it is not material whether that business is with private persons or with the taxing government itself.

As bearing upon the principles herein enunciated, I refer to *Murray v. Charleston* (96 U. S., 432), *Gaslight Co. v. Taxing District* (109 U. S., 398), *Railroad Co. v. New Orleans* (148 U. S. 192.)

You are therefore advised that the United States Express Company is not by reason of its contract exempt from the requirements of the war-revenue act in the transportation of money, securities, etc., for the Government.

Respectfully,

JOHN W. GRIGGS.

The SECRETARY OF THE TREASURY.

MAILS—LOTTERY.

An advertising circular, containing a picture and description of a slot machine designed for the purpose of gambling or the distribution of prizes dependent upon lot or chance, can not be excluded from the mails of the United States under the lottery law of September 19, 1890.

DEPARTMENT OF JUSTICE,
August 29, 1898.

SIR: I have the honor to acknowledge receipt of yours of the 24th instant, inclosing copy of advertisement of C. S. Turner & Co., of Wilkesbarre, Pa., and desiring an opinion as to whether or not this advertisement should be excluded from the mails of the United States under the lottery law approved September 19, 1890 (26 Stats. L., 465).

The facts as given in your letter are as follows:

The advertisement is headed "The Boomer," and it is a picture of a slot machine, a description thereof, and an offer for its sale. You state further that the machine is designed for the purpose of gambling or the distribution of prizes dependent upon lot or chance, and you base this conclusion upon the following clause of the advertisement, namely:

"A nickel is dropped in the top of the frame, and causes the hand to revolve several times on the face of the dial, finally stopping at a number which denotes the quantity of articles to which the customer is entitled."

You then cite me to the following provisions of the law above referred to:

"That no * * * circular concerning any lottery * * * or * * * enterprise offering prizes dependent upon lot or chance shall be carried in the mail or delivered at any post-office."

I do not think that the advertisement which you inclose and describe is excluded from the mail of the United States under this law. The advertisement is not a "circular concerning a lottery or enterprise offering prizes dependent upon lot or chance." It is an advertisement for the sale of a piece of machinery which anyone, who desires, can buy. There is no lot or chance connected with the purchase of this machine. No matter what its purpose may be when put

into operation. It may be that the machine itself is a contrivance purporting to offer chances for gain; and, when a purchaser gets it and places it where it can be used, it is probable that it will be patronized because of the fact that when a nickel is dropped into the slot the person dropping it expects to procure a prize, and yet there can be no semblance of a lottery or chance in proposing to sell the machine itself.

I therefore hold that the advertisement which you inclose for the sale of this contrivance called "The Boomer," which is a slot machine into which a nickel may be dropped as described, is not an advertisement concerning a lottery or enterprise offering prizes dependent upon lot or chance within the meaning of the statute which you have cited.

Respectfully,

JAMES E. BOYD

Acting Attorney-General.

The POSTMASTER-GENERAL.

ARMY OFFICERS—RETIREMENT.

An officer of the Regular Army holding at the same time a commission in the Volunteer Army, may continue to hold and exercise his commission in the Volunteer Army after having been placed upon the retired list by reason of the age limit.

The act of June 20, 1882, relative to retirement, applies to an officer of the Regular Army who is 64 years of age, temporarily serving under a volunteer commission without affecting his status in the volunteer service, but does not apply to a volunteer officer not being in the Regular Army who is 64 years of age.

DEPARTMENT OF JUSTICE,

August 30, 1898.

SIR: Acknowledging the receipt of your communication of July 23, 1898, calling my attention especially to that portion of the act of June 20, 1882 (22 Stats., 117), which provides that when "an officer is 64 years of age he shall be retired from the active service and placed on the retired list," and requesting my opinion on the question whether when an officer of the Regular Army serving for the time being in the Volunteer Army, under the provisions of the act of April 22,

1898, becomes 64 years of age, the said act of 1882 requires that he be retired from active service and placed upon the retired list, I have the honor to state in response, that my opinion, addressed to you under date of August 3, replying to the request of your communication of July 14, substantially answers this query. But as in your letter of July 23 you place the question in the alternative form, "or whether the law of 1882 is in abeyance during the time the officer is performing duty in the Volunteer Army," I have the honor to state that, in my opinion, the law of 1882 is not in abeyance, but takes effect at the due time *quoad* such officer's status in the regular service, leaving his status in the volunteer service unaffected. I therefore repeat the conclusion reached in my former opinion, viz, "that an officer of the Regular Army holding at the same time a commission * * * in the Volunteer Army, may continue to hold and exercise his commission in the Volunteer Army after having been placed upon the retired list by reason of the age limit."

You also ask my opinion on the question whether the act of June 20, 1882, applies to any officer of the Army, regular or volunteer, who is 64 years of age.

The significant portion of the act in question (22 Stats., p. 118) provides:

"That on and after the passage of this act, when an officer has served 40 years either as an officer or soldier in the regular or volunteer service, or both, he shall, if he make application therefor to the President, be retired from active service and placed on the retired list, and when an officer is 64 years of age, he shall be retired from active service and placed on the retired list."

This provision and similar provisions of the statutes (sec. 7, act June 18, 1878, 20 Stat., 145, 150) are in case of the officers and enlisted men of our armies, and were not intended to draw after them a burden, and operate to restrict future eligibility to service in such an emergency as has arisen, nor to limit their rights to office under appointment to a new volunteer service, nor further, it may be added, to limit the right of the President so to appoint. In other words, the volunteer service contemplated by these acts, to be computed for the benefit of officers and soldiers in arriving at

rights to retirement and longevity pay, was clearly the volunteer service in the civil war. The acts in question may not be held, in my opinion, to be prospective and to have anticipated a new volunteer service such as has arisen under the act of 1898, creating the present volunteer army. In addition, the contrary view requires two results which (not being expressly provided or even implied by any laws on the subject) are so unreasonable as to constitute that degree of impossible consequence in legislation which the courts will reject (e. g., *Lau Ow Bew v. United States*, 144 U. S., 47, 60, 62), viz: The results that the President would not have the right to appoint to an office in the volunteer service under the act of 1898 any one of the age of 64 years or over, and that an officer in the volunteer service reaching the age of 64 years, without the continuous service contemplated by the retirement acts and no matter how brief his period of duty, is entitled to be retired and placed on the unlimited retired list of the Army. It is only necessary to state this position to refute it. The army retired lists apply to the Regular Army alone, with due credit given for the time of volunteer service of officers of the Regular Army prior to the present war. These views are to be inferred from the language of my opinion already cited. I therefore advise you that the act of June 20, 1882, applies to an officer of the Regular Army who is 64 years of age, temporarily serving under a volunteer commission, without, however, affecting his status in the volunteer service, but does not apply to a volunteer officer (not being of the Regular Army) who is 64 years of age.

Respectfully,

JAS. E. BOYD,

Acting Attorney-General.

The SECRETARY OF WAR.

CHINESE.—CERTIFICATES.

Chinese subjects of the permitted class, coming into the United States from China must produce the certificate of the Government of China. Privileged Chinese subjects resident within a foreign jurisdiction in order to gain admission into the United States must have a certificate issued by the foreign government and not by the officials of China.

DEPARTMENT OF JUSTICE,

August 31, 1898.

SIR: I have the honor to acknowledge the receipt of your communication of July 23, 1898, in which you invite my attention to the opinion of my predecessor, dated January 8, 1894 (20 Opin., 693), holding that certificates issued by consular officers of China in a foreign country are certificates contemplated by section 6 of the Chinese exclusion act of July 5, 1884; and to the opinion of my predecessor, dated May 20, 1896 (21 Opin., 347), holding that under the treaty with China of March 17, 1894, the certificates in question must issue from the proper authorities of the foreign government where Chinese subjects of the privileged classes, applicants for admission to the United States, last resided; and in which, finally, in view of the foregoing, you request my opinion as to the authority of consular officers of China in foreign countries to issue the certificates prescribed in section 6 of the said act of 1884.

It is fairly to be assumed that the Chinese persons, whose case we are to consider in this review, are those of the classes privileged to be admitted into the United States, who are subjects of China, resident in some other foreign country. The treaty referred to regards, in this connection, only "Chinese subjects" in terms and by necessary intendment; and the opinion last cited expressly relates to Chinese subjects alone. The act of 1884 embraces Chinese persons who are subjects of other foreign governments, as well as those who are Chinese subjects, but the opinion first cited, construing section 6 of this act, necessarily has in view only the latter class, since it may hardly be doubted that under this section it was, and is, requisite, that Chinese persons entitled to admission to the United States, being subjects of some other foreign government than that of China, must produce a certificate issued by the proper officials of such government and not by those of China. At all events, the question as it affects Chinese persons, other than Chinese subjects, is beyond the scope of our inquiry, and we may therefore dismiss that branch of the case. In any view it is reasonable to conclude that if the determination reached by me is that consular officers of China in a foreign country are

not authorized to issue to Chinese subjects resident therein the certificates prescribed by the act of 1884, *a fortiori* such consular officers are not authorized to issue these certificates to Chinese persons who are the subjects of such other foreign country.

Section 6 of the act of July 5, 1884 (23 Stats., 115), provides that—

* * * “Every Chinese person, other than a laborer, who may be entitled by said treaty (the treaty of 1880) or this act to come within the United States, and who shall be about to come to the United States, shall obtain the permission of and be identified as so entitled by the Chinese Government, or of such other foreign government of which at the time such Chinese person shall be a subject, in each case to be evidenced by a certificate issued by such government.” * * *

The opinion first cited herein, construing the language of this section that the “permission” and “identification” of the Chinese person shall be “evidenced by a certificate issued by such government,” reaches the conclusion that certificates accurately conforming to the requirements of section 6 and issued by consular officers of China in a foreign country, duly empowered by the Chinese Government, are valid. The words of the act “such government” point to the “Chinese Government or * * * such other foreign government of which at the time such Chinese person shall be a subject.” This language is to be taken distributively rather than as allowing an alternative source for the certificate, either to Chinese subjects or to persons of Chinese descent who are not Chinese subjects, and hence the conclusion of the opinion in question quite clearly implies, as before indicated, an application only to *subjects* of China resident in another foreign country.

The situation was changed by Article III of the convention of 1894 between the United States and China (28 Stats., 1210), which reads:

* * * “To entitle such Chinese subjects as above described to admission into the United States, they may produce a certificate from their government or the government where they last resided, viséd by the diplomatic or

consular representative of the United States in the country or port whence they depart." * * *

My predecessor was of the opinion (21 Opin., 347) that the provisions of this article of the treaty of 1894 are self-executing and are a part of the supreme law of the land, and he holds in effect, therefore, that while prior to the treaty of 1884 a certificate from the foreign authorities as to privileged Chinese subjects resident within a foreign jurisdiction would have been insufficient, and a certificate from the Chinese Government or its accredited consular officials would have been necessary, the treaty being subsequent to the act of 1884 has modified the requirements thereof, so that the certificate must now be issued in such cases by the foreign government and not by officials of China. This opinion evidently regards the treaty as mandatory on this point, and suggests no alternative under which such an applicant for admission might properly produce either the certificate of consular officials of China or the certificate of the foreign government. I concur in this reasoning and conclusion. There is no fundamental inconsistency or repugnancy between the act and the treaty, nor between the opinions of my predecessors considering them respectively, nor has any radical change in procedure resulted from the partial modification of the act by the treaty. The certificate is the same in its contents and incidents, but the source from which it issues in the case which we are considering has been transferred from the Chinese Government to the foreign government of residence. The whole scope of the question may be summarized as follows:

Chinese subjects of the permitted classes coming into the United States from China must produce the certificate of the Government of China, and coming from other foreign countries, in which they are residents, must now produce, under the treaty of 1894, the certificate of the government of such countries, and not, as under the act of 1884 (as considered in 20 Opin., 693), the certificate of consular or other proper officials of China. It lies beyond our inquiry, as I have intimated, to determine whether, granting that under the act of 1884 the certificate of a Chinese person being the subject of another foreign government must be issued by

that government when he comes from its jurisdiction into the United States, it should be issued by that government or by the government of residence when he resides elsewhere and proceeds therefrom to the United States. To such Chinese persons the treaty of 1894 does not legally extend, and it has not been determined, so far as I am aware, whether as to them the test of relation as subject or citizen indicated by the act of 1884 or the test of residence by an equitable application (so to speak) of the principle of the treaty is to be invoked. It may be that this latter question is not of practical moment at present, or that you have already in the regulations and practice of your Department disposed of it.

I therefore respond to your request by stating that, in my opinion, there is no authority to be derived from our existing laws granting to consular officers of China in a foreign country the right to issue the certificates prescribed by section 6 of the act of July 5, 1884.

Very respectfully,

JAS. E. BOYD,
Acting Attorney-General.

The SECRETARY OF THE TREASURY.

PRIZES—BOUNTY.

Questions as to bounty under § 4635, Revised Statutes, should be submitted to a judicial tribunal.

Proceedings for adjudication of bounty for the capture or destruction of a vessel may be begun at the instance of the Secretary of the Navy in any district that he may designate, and upon his failure to designate a district within three months after the vessel has been captured or destroyed, the claimants may institute proceedings.

The Court of Claims has authority to hear and determine such questions of bounty, either as a claim founded upon a law of Congress, or as one which may be transmitted to it by the head of a department, under § 1063, Revised Statutes, and the act of March 3, 1887.

In determining questions with reference to bounty arising under § 4635, Revised Statutes, the Secretary of the Navy is authorized: (1) To institute proceedings under a libel of information in a district court of the United States, sitting as a prize court; (2) to submit the case to the Court of Claims; (3) to proceed to determine the question arising and award the bounty.

DEPARTMENT OF JUSTICE,

September 2, 1898.

SIR: I have the honor to acknowledge the receipt of your communication of August 30, wherein you refer to me the fact that prize lists have been presented by commanding officers of naval vessels, on behalf of themselves and the officers and men under their command, claiming a share in the distribution of prize moneys accruing from the sale of vessels and cargoes condemned during the war with Spain and ordered by the prize courts to be sold or else taken for use of the United States.

In considering these claims it is assumed by you that two steps are necessary: First, a determination by decree of the prize court as to the source and net amount of the prize proceeds, as to the proportion allowable to the Government and captors in the aggregate, and as to the vessels entitled to share; secondly, a determination as to the individuals entitled to share, this function devolving upon the Navy Department and the Treasury Department.

I am of the opinion that these assumptions are correct and that under sections 4634, 4637, and 4641, Revised Statutes, the law is well summarized in the case of *Swan v. United States*, to which you refer (19 Ct. Cls., 51), and in which section 4 of the syllabus succinctly states the rules, viz:

“The term ‘distribution’ in the prize act of 1864 refers to a division of prize money (1) among vessels or between a capturing vessel and the Government; (2) among the fleet officers and individual captors. The former division must be decreed by the prize court, the latter by the Treasury Department; and the prize court is without jurisdiction to make distribution among individual captors, except in the case of captures by privateers.”

Consequently, in accordance with your request, I have directed the United States attorneys for the respective districts in which prize causes have been adjudicated or are pending to obtain and forward to your Department copies of the several decrees rendered in such cases in their respective districts, calling their attention to section 4644, Revised Statutes.

The question as to bounty, under sections 4635 and 4642, presents greater difficulties. There is some authority, both in view of the language of this section and of the various decisions and rulings, for the contention that this is a proper case for Executive determination and action, and not for the courts; but in the main this view has arisen with reference to army bounty provisions of the law consequent upon the civil war and of the wars prior thereto in which the United States has been engaged. I do not undertake authoritatively to decide, in the absence of conclusive judicial decision, that you have not the power to determine all the questions arising under section 4635, but the better view I believe to be that the questions of fact involved as to the status of the vessels destroyed and whether they were of superior, equal, or inferior force to our naval vessels engaged, and as to which of our naval vessels were engaged, should be adjudicated by the proper court or courts, which would also take cognizance of the legal question of jurisdiction. This is the conclusion which my predecessor reaches in 12 Opinion, referred to below, in which he considers the subject of bounty to demand judicial investigation, and regards the jurisdiction of the prize court as manifestly proper if not exclusive.

The cases of *Porter v. United States*, *Farragut v. United States*, and *The Manasses* (*infra*), are authority for the view that questions as to bounty under section 4635 should be submitted to a judicial tribunal. The question then arises, What court is the proper one? The general principle is well established in prize causes that, with few exceptions, the prize court has no jurisdiction without having possession of the prize. This fact would defeat the ordinary prize jurisdiction in the case before us. (*Santissima Trinidad*, 7 Wheat., 283; *Harlan v. United States*, 4 Wall, 635; *Jecker v. Montgomery*, 13 How., 498.) But it remains to be considered whether this case constitutes one of the exceptions to the rule.

The case of *The Nuestra Senora de Regla* (108 U. S., 92), although the vessel there was in the actual custody of the prize court, is authority for the general proposition that the Executive may, without legislative authority, submit certain

questions incident to prize law to the determination of a judicial tribunal. No reason exists, I think, for holding that in analogy thereto the Executive may not voluntarily and properly submit to the determination of a prize court the questions as to bounty herein arising.

In the case of *Porter v. United States* (106 U. S., 607), which is directly in point, it was determined that the bounty was not allowable under the prize act where vessels of the enemy were destroyed by the combined action of the sea and land forces of the United States. In the language of the report, this was a proceeding termed a libel of information, filed in the supreme court of the District of Columbia on behalf of Admiral Porter and others, officers and men of the North Atlantic Squadron, to recover bounty provided by the act of Congress. There is nothing in the report of this case or in the opinion of the Supreme Court to suggest a doubt of the jurisdiction of the supreme court of the District of Columbia, and the fact that the last-named court was sought may be held to indicate a doubt that the prize court of the proper district would have been the proper tribunal. The supreme court of the District of Columbia being clothed with jurisdiction of circuit courts of the United States, the proceeding in the Porter case might be viewed as falling under that narrow branch of prize jurisdiction committed to the circuit court by paragraph 6, section 629, Revised Statutes, in reference to the condemnation of property used for insurrectionary purposes; or, more probably, jurisdiction was taken by the court sitting as a district court of the United States in admiralty or in prize on the theory that the case was incident or assimilated to prize.

Additional light is cast upon this subject by the Farragut prize and bounty cases and the case of *The Manasses*. These were petitions or libels filed with the effect of a libel in prize in the supreme court of the District of Columbia, sitting as a district court of the United States. The proceedings instituted claims on behalf of officers and men of the Navy for the proceeds or value of certain captured vessels and other property of the enemy during the civil war, and to bounty in respect of certain vessels sunk or destroyed. The Farragut cases were submitted to arbitrators after the

institution of proceedings in court, and their award was made, in each case, the decree of the court. The prize case involved the question of a joint capture by army and navy forces and other questions affecting the validity as prize of the captures or regarding salvage, which are not pertinent to our inquiry. The case reached the Supreme Court of the United States on appeal, and was disposed of there by approving in most respects the award and the decree of the court below based thereon. (*United States v. Farragut*, 22 Wall., 406.) In *The Manasses* case it appears that the court took jurisdiction, and after hearing entered a decree finding the facts as to the force of the enemy's vessel and the number of persons on board, and awarding out of the special appropriation for bounties for destruction of the enemy's vessels then existing a gross sum "to be distributed in the same manner as prize money under the direction of the Secretary of the Navy." In the Farragut bounty case Justice Wylie dismissed the libel on the ground that our law as to bounty, differing from the law as to adjudication in prize and in respect to procedure from the British bounty act, has conferred full authority on the Secretary of the Navy to distribute the bounty of the Government without an adjudication of the court. (District of Columbia Reports, vol. 7, p. 94.) Subsequently the decree based upon this opinion was reversed by a majority of the court sitting in banc, and ultimately a decree of allowance of bounty and distribution was entered determining the facts requisite to be ascertained under section 4635. Neither the Farragut bounty case nor *The Manasses* case appears to have been carried to the Supreme Court of the United States, but a record of the various proceedings and briefs is contained in a volume entitled "Farragut Prize and Bounty Cases" (Library, Department of Justice).

In similar proceedings at about the same period the Secretary of the Navy appears to have acquiesced or to have voluntarily submitted the questions to the court, and while the question of jurisdiction was thus being mooted my predecessor rendered an opinion (12 Opin., 314) in which he held that the ascertainment of bounty or head money for the destruction of armed enemy's vessels by a naval vessel

of the United States was the subject of judicial cognizance by the admiralty courts of the United States, and that proceedings to that end in the district court of the District of Columbia are regular and valid. His view is that the questions arising upon bounty provisions are eminently fitted for adjudication in court, and that such cases, while anomalous under the English statutes and our own, are to be assimilated to those of prize and the prize jurisdiction so far extended to instances where the property itself is not brought in for adjudication.

It may well be, however, that concurrent jurisdiction exists in such a proceeding. The ultimate right of the claimants to proceed in some forum can not be doubted, and perhaps without the sanction of your Department if such a contingency should arise; and as in England the King's prosecutors may consent to the claim of the captors for head money being brought for decision before the court of admiralty, so the executive officers of this Government charged with the duty of paying and distributing head money may in this way avail themselves of the jurisdiction of a court to determine the delicate questions often arising in respect to this species of bounty. Under a reasonable extension of the principle of section 4625 to the special bounty provisions, it appears to me that proceedings for adjudication may be begun at the instance of the Secretary of the Navy in any district which he may designate, and if he does not designate a district within three months after the enemy's vessel has been captured or destroyed the claimants may institute proceedings in any district. But there appears to me to be concurrent jurisdiction in this case in the Court of Claims, for by sections 1059, 1063, and 1064, Revised Statutes, as amended or affected by sections 1 and 12 of the act of March 3, 1887 (24 Stat., 505), the Court of Claims would seem clearly to have authority to hear and determine this question, either as a claim founded upon a law of Congress or as a claim which may be transmitted to it by the head of a Department under section 1063 and under the act of 1887 above referred to (13 Opin., 164, 168).

I may point out that section 2 of the act of 1887 provides for concurrent jurisdiction between the district and circuit

courts of the United States and the Court of Claims, with certain limitations as to the amount involved in a claim, which limitations, however, might not be effective to restrict the jurisdiction to the Court of Claims if the matter were connected with prize law.

I may also point out that section 2 of the act of March 3, 1883 (22 Stats., 485), provides for the submission by any of the executive departments to the Court of Claims of a claim or matter involving controverted questions of fact or law, under which section the facts and conclusions of law shall be found by the court, but judgment shall not be entered thereon, it being directed that the findings and opinions of the court shall be reported to the Department by which the matter was submitted for its guidance and action.

Reiterating, therefore, that I do not hold hereby that there is not executive jurisdiction for the determination of the facts and questions arising under section 4635, in view of these statutes regulating the Court of Claims, and in view of the fact that the practice by which similar proceedings heretofore have been carried on in the supreme court of the District of Columbia has not been extensive or firmly settled, I am of the opinion that you may cause this proceeding to be instituted under a libel of information in a district court of the United States sitting as a prize court (which would include the supreme court of the District of Columbia) at your own instance or by claimants, or you may bring the proceedings in a similar form by transmittal or submission of the case to the Court of Claims; or you may, if in your judgment there are sufficient facts before you of record in your Department upon which to proceed, yourself determine the questions arising and award the bounty.

Very respectfully,

JAS. E. BOYD,

Acting Attorney-General.

The SECRETARY OF THE NAVY.

SEAMEN—DISCHARGES.

The master of an American steamship requested the discharge of a seaman, the latter joining in the request. The log book showed that on a certain day the sailor refused to work, alleging sickness, which proved to be intoxication, and the following day he was unable to work from consequent illness. For these reasons the master deducted from his wages four and eight days' pay, respectively. *Held*, The consul-general was justified in discharging the seaman.

The master of the vessel had no legal right to impose and collect the fines indicated, as the entries in the log book did not amount to satisfactory evidence of unlawful refusal or neglect to work when required. If the seaman was discharged because of unusual or cruel treatment, he is entitled to the one month's extra wages allowed by statute, and in such cases the consul-general is authorized to exercise some reasonable discretion in determining this extra allowance, in reference to actual or anticipated ill treatment.

DEPARTMENT OF JUSTICE,
September 20, 1898.

SIR: I have the honor to acknowledge the receipt of your communication of September 6, inclosing copy of a dispatch from the United States consul-general at Panama, and asking my opinion upon certain questions raised thereon.

It appears that on August 15, 1898, Capt. W. H. McLean, master of the American steamship *San José*, came before the consul-general requesting the discharge of John Dowd, a coal passer on said vessel, said Dowd appearing and joining in the request, which was granted. The captain then produced his log book, whereon were certain entries to the effect that on August 12 Dowd had refused to work, alleging sickness, which, on examination, proved to be intoxication, and that on the following day he again refused to work, being unable to do so from illness consequent on his condition the preceding day. For these offenses the master deducted from his wages four days' pay and eight days' pay, respectively, amounting in all to the sum of \$14. While the discharge was desired by both master and seaman, the consul-general states that his principal reason for discharging the latter was the fact that he felt it would be unsafe to send the man back to the vessel owing to the evident ill will displayed by the master toward the seaman.

You ask me, first, whether the consul-general acted correctly in discharging the seaman.

Section 4580 of the Revised Statutes, as amended by the act of June 26, 1884 (23 Stats., 53) provides that—

“Upon the application of the master of any vessel to a consular officer to discharge a seaman, or upon the application of any seaman for his own discharge, if it appears to such officer that said seaman * * * is entitled to his discharge under any act of Congress or according to the general principles or usages of maritime law, as recognized in the United States, such officer shall discharge said seaman, and require from the master of said vessel, before such discharge shall be made, payment of the wages which may then be due said seaman.”

A consular officer may discharge a seamen in case of desertion caused by unusual or cruel treatment (act of June 26, 1884, sec. 6); also when the seaman is unusually or cruelly treated without having deserted. (Consular Regulations, par. 211.) When insubordination or bad conduct are alleged, the grounds on which a seaman may be discharged are generally such as to amount to a disqualification and show him to be an unsafe or unfit person to have on board a vessel; and the consular officer must satisfy himself that good and substantial reasons exist for a discharge before granting the application. (Consular Regulations, par. 213.)

In this case the offenses charged against the seaman would hardly have constituted sufficient grounds for his discharge without his consent. A seaman is not to be discharged for slight or venial offenses, nor for a single offense unless of a very aggravated character (The Superior, 22 Fed. Rep., 927; Cons. Reg., par 212). If the seaman is charged with insubordination, it should satisfactorily appear that he is incorrigibly disobedient, and that he persists in such conduct (The T. F. Oakes, 36 Fed. Rep., 442). Here, however, the discharge was requested by the seaman as well as the master, and it was therefore proper to grant it if “according to the general principles or usages of maritime law as recognized in the United States” (act of June 26, 1884, sec. 2). As above shown, a seaman may be discharged for unusual or cruel treatment, and while in the present case no cruel treatment is actually recorded, yet if the consul-general discharged Dowd for these reasons, or because he feared such

treatment might supervene, the seaman himself joining in the application, your first question must be answered in the affirmative.

You next inquire whether the master of the vessel had the legal right to impose and collect the fines above mentioned.

As shown by the master's log book, Dowd lost two days' work as a result of his intoxication and consequent illness, and was thereupon fined twelve days' pay, or \$14. Section 4528, Revised Statutes, provides that a seaman is not entitled to wages for any period during which he unlawfully refuses or neglects to work when required. In the absence of other authority permitting the imposition of such fines, your question must be answered in the negative. In my judgment the log-book entries do not amount to satisfactory evidence of unlawful refusal or neglect to work when required.

Your third inquiry is: Should extra wages have been collected?

By section 4600, Revised Statutes, as amended by the act of June 26, 1884, a seaman who has deserted on the ground of cruel and unusual treatment, and is discharged by the consular officer, is entitled to one month's pay, and this provision is construed to apply to seamen discharged for the same reason, but who have not deserted (Cons. Reg., par. 222). I am of the opinion that if Dowd was discharged by the consul-general because of unusual or cruel treatment, he is entitled to the one month's extra wages allowed by statute, and that some reasonable discretion is to be permitted to the consular authority in determining this extra allowance in reference to actual or anticipated ill-treatment and a discharge consequent thereon.

Very respectfully,

JOHN W. GRIGGS.

The SECRETARY OF STATE.

TREATIES—FISHERIES.

The United States has power to enter into treaty stipulations with Great Britain for the regulation of the fisheries in the waters of the United States and Canada along the international boundary.

The regulation of fisheries in navigable waters within the territorial limits of the several States, in the absence of Federal treaty, is a subject of State rather than of Federal jurisdiction.

The fact that a treaty provision annuls and supersedes the law of a particular State upon the same subject is no objection to the validity of the treaty.

DEPARTMENT OF JUSTICE,

September 20, 1898.

SIR: By a communication dated September 15, 1898, you request me to furnish you with my opinion as to the power of the United States to enter into treaty stipulations with Great Britain for the protection of the fisheries in the waters contiguous to the territory of the United States and Canada along the international boundary from the Atlantic to the Pacific Ocean and on the Great Lakes.

Under the Federal Constitution the President is invested with the power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur. (Art. II, sec. 2, par. 2.)

By section 10 of Article I of the Constitution, it is provided that no State shall enter into any treaty, alliance, or confederation. The exclusive right, therefore, of regulating by treaty with foreign nations all matters which are the proper subject of international agreement has been taken away from the States and committed to the Federal Government.

The Constitution nowhere attempts to specify or define the subjects of treaty regulation, but it has made a specific declaration of the supreme authority of treaties when made under the authority of the United States. Article VI, paragraph 2, declares:

“All treaties made, or which shall be made, under the authority of the United States shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding.”

The waters of the lakes and rivers which form the boundary between the United States and Canada are upon this side of the boundary line within the territorial jurisdiction of the several riparian States. The regulation of fisheries in navigable waters within the territorial limits of the several

States, in the absence of a Federal treaty, is a subject of State rather than of Federal jurisdiction. Congress has the paramount right to regulate navigation in the navigable waters of the United States for the benefit of all the citizens of the Union, but Congress has no authority, in the absence of treaty regulations, to pass laws to regulate or protect fisheries within the territorial jurisdiction of the States. (*McCready v. Virginia*, 94 U. S., 391; *Lawton v. Steele*, 152 U. S., 133.)

The question for consideration, therefore, is whether the United States by treaty may deprive the riparian States of the power of control and regulation over the fisheries in the waters within their respective jurisdictions conterminal with the boundary between the United States and Canada. It is obvious that if by the exercise of the treaty-making power the regulation of this subject is assumed by the Federal Government the respective State governments will be deprived of jurisdiction over that subject in the same waters.

The regulation of fisheries has been recognized as a proper subject for international agreement. By the treaties with Great Britain in 1854 and 1871 certain rights of fishing were granted by the United States to citizens of Canada in the waters within the 3-mile limit of the States from Maine to Delaware. The nature and habits of fishes, the means necessary to their preservation from extinction, and their protection in spawning time are such as to render it of importance that laws regulating their capture shall be uniform and uniformly enforced over the whole extent of the body of water which they inhabit. Where a lake or river is divided into two jurisdictions by a boundary line between two nations, it is manifest that it would be not only convenient but almost necessary for the adequate regulation of the subject that an agreement by treaty or other stipulation should exist between the governments of the two countries, in order to make any system of regulation and protection effective. The several States are by the Constitution forbidden to enter into any such treaty or regulation with any foreign power, and unless the United States may regulate the subject by treaty it is impossible of

regulation by uniform and reciprocal rules. I advise you, therefore, that the regulation of the fisheries in these boundary waters is a proper subject of the treaty-making power vested by the Constitution in the President.

If it be suggested that such a treaty is beyond the constitutional power of the President and the Senate to effect, because it deprives the States of jurisdiction and authority now vested in them, and practically would annul their laws and destroy one subject of State sovereignty, without going into a history of that clause of the Constitution above quoted, which declares that all treaties made or which shall be made by the authority of the United States shall be the supreme law of the land (the discussions of which in the Constitutional Convention and in the State conventions called for the adoption of the Constitution were very extensive and interesting), it is sufficient to say that it has been held by the Supreme Court of the United States that it is no objection to the validity of a treaty that it establishes within State jurisdiction a different law and standard of rights from that established by the laws of the State. That court has decided in the interest of a British subject that a treaty can annul a statute of a State confiscating the debt due to a British subject. (*Ware v. Hylton*, 3 Dallas, 199.) It was held in the case of *Hauenstein v. Lynham* (100 U. S., 483) that a State law forbidding an alien to take lands by descent must give way to a treaty which confers the right of inheritance upon a subject of a foreign power. So that it is established by judicial decision of the highest authority that the mere fact that a treaty provision annuls and supersedes the law of a particular State upon the same subject is no objection to the validity of the treaty. In the case of *Geofroy v. Riggs* (133 U. S., 258) Mr. Justice Field declared that the treaty power of the United States extends to all proper subjects of negotiation between our Government and the governments of other nations. "The treaty power as expressed in the Constitution is in terms unlimited except by those restraints which are found in that instrument against the action of the Government or of its departments, or those arising from the nature of the Government itself and that of the States. It would not be contended that it extends so

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far as to authorize what the Constitution forbids, or a change in the character of the Government or in that of one of the States, or a cession of any portion of the territory of the latter without its consent. But with these exceptions it is not perceived that there is any limit to it touching any matter which is properly the subject of negotiations with a foreign country."

My conclusion is that the United States has power to enter into treaty stipulations with Great Britain for the regulation of the fisheries in the waters of the United States and Canada along the international boundary.

I have the honor to be, very respectfully,

JOHN W. GRIGGS.

The SECRETARY OF STATE.

STAMP TAX—PROMISSORY NOTE—PLEDGE.

Upon promissory notes a stamp is required of the value of 2 cents for a sum not exceeding \$100, and for each one hundred dollars or fractional part thereof in excess of \$100, 2 cents additional.

In fixing the amount of tax required upon a mortgage or pledge of stock or property given to secure the payment of a promissory note for a definite and certain sum, the actual value of the stock or property is immaterial.

A paper or instrument stipulating that certain securities or other property shall be held as indemnity or as a basis of credit, or a guaranty generally, without specifying particular property as security for the payment of a definite and certain sum, is not liable to tax under the provisions of the war-revenue act.

Such a paper, being a pledge of property for the payment of a debt, is not to be construed as a power of attorney and stamped as such, as it only authorizes the holder, in case of default, to make the securities available for the purposes for which they were deposited.

A power of attorney is an instrument by which the authority of one person to act in the place of another, as attorney in fact, is set forth.

DEPARTMENT OF JUSTICE,
September 21, 1898.

SIR: I have the honor to acknowledge receipt of yours of 30th August, ultimo, in which you submit certain papers and instruments, and request my opinion as to the stamp required under the provisions of the war revenue act.

The first question is as to the stamp required upon a note and instrument as follows:

"No. _____. \$100,000.00.

"Chicago, _____, 189—.

"On demand _____, I _____, promise to pay to the order of the Northern Trust Company at its office in Chicago one hundred thousand dollars for value received, with interest at the rate of _____ per cent per annum after date.

"_____.

"_____."

Accompanying this note, and upon the same paper, is the following instrument:

"_____ I _____ have deposited with and pledged to said The Northern Trust Company, as collateral security for the payment of above and foregoing note and all other liabilities of the undersigned to said trust company or its assigns heretofore or hereafter contracted, the following property, viz: One thousand shares of Chicago and Northwestern Railway common stock, the market value of which is now \$_____. In case said trust company, or any of its officers, agents, or assigns, shall at any time be of opinion that said property is of less value than above stated, or that the whole or any part of said property has declined or may decline in value, or in case any liability or liabilities of the undersigned to said trust company or its assigns shall be at any time increased, then in all, any, or either of such cases said trust company or its assigns may, in its or their discretion, call for additional security satisfactory to the holder of said note, and failure to furnish the same before 12 o'clock noon of the day next after the day of such call shall make said note and all other liabilities of the undersigned to said trust company or its assigns, without notice or demand, at once due and payable. Said call for additional security may be made by giving any of the undersigned oral or written notice thereof, or by leaving written notice thereof at any office, place of business, or usual abode of any of the undersigned. The undersigned hereby give said trust company, or any of its officers, agents, or assigns, irrevocable power to sell said property or any part thereof,

without advertising or demanding payment or giving notice at public or private sale or sales or at any brokers' board, in case said trust company, or any of its officers, agents, or assigns, shall at any time be of the opinion that said property or any part thereof has declined or may decline in value, or is or may be of less value than above stated, or in case such additional security, if called for, shall not be furnished as above provided, or in case said note or any other liability or liabilities of the undersigned to said trust company or its assigns shall not be paid at maturity. If said sale or sales shall be public or at any brokers' board, said trust company or its assigns may purchase said property or any part thereof at such sale or sales. The net proceeds of such sale or sales, after payment of all expenses and attorney's fees growing out of or connected with said property and the sale and delivery thereof, may be applied upon all or any of the liabilities (whether due or not), of the undersigned to the holder of said note, and the surplus, if any, shall be paid to the undersigned. If the net proceeds of such sale or sales shall not pay in full all the liabilities of the undersigned to said trust company or its assigns, then all such liabilities remaining unpaid shall become at once due and payable and bear interest at the rate of seven per cent per annum from the time of such sale. In case of any exchange of or substitution for, or addition to said property or any part thereof, the provisions of this agreement shall extend to such new, exchanged, substituted, or additional property. And the undersigned hereby authorize said trust company at any time, at the discretion of any officer or agent thereof, to apply any money or moneys which said company may have or hold on deposit or otherwise for the undersigned toward the payment of said note and other liabilities, whether due or not. The word liabilities herein shall include all liabilities of undersigned, whether of same class as said note or otherwise, and whether of undersigned alone or jointly with others. The undersigned hereby expressly empowers said trust company at its option to subscribe for, take, and hold as additional collateral to any and all of the indebtedness above named all stock increases and stock and

other special dividends which may be made upon collaterals held hereunder.

“_____,”
“_____.”

The stamp required upon this promissory note is easily determined, the law being that upon promissory notes a stamp is required of the value of 2 cents for a sum not exceeding \$100, and for each \$100 or fractional part thereof in excess of \$100 2 cents.

The paper following the note presents two phases: In the first place, it is a pledge of certain specific personal property described therein, as security for the payment of the promissory note for \$100,000. It therefor requires a stamp as a pledge of personal property for the payment of a definite and certain sum of money, to wit: the sum of \$100,000. The actual value of the 1,000 shares of Chicago and Northwestern Railway common stock, which is deposited and pledged, is not stated, but if it were it would not be material, for the stamp required upon a mortgage or pledge of property given to secure the payment of a definite and certain sum is governed by the sum secured to be paid, and not by the actual value of the property included in the mortgage or pledge. For instance, if A borrows from B \$5,000 and gives a note for it to B, and at the same time executes a mortgage or pledge as security for its payment upon property worth \$50,000, the stamp upon the mortgage or pledge would not be estimated by the actual value of the property, but by the amount secured to be paid, as set forth in the face of the mortgage or pledge. So then the note for \$100,000 and the paper executed in conjunction with it, pledging the stock described as security for the payment, do not, so far as I can see, present any difficulty in arriving at the stamp required to be placed thereon under the provisions of the war-revenue act.

As before stated, in the first place, the one thousand shares of railroad stock are deposited and pledged to the Northern Trust Company as security for the payment of the above and foregoing note, meaning the note for \$100,000. Then follows the stipulation in these words: “and all other liabilities of the undersigned to said trust company, or its

assigns heretofore or hereafter contracted." This presents the second phase of the instrument, and is the one from which the principal question arises. The provision of the war-revenue act is that a mortgage or pledge of property made as security for the payment of any definite and certain sum of money, lent at the time or previously due and owing, or forborne to be paid being payable * * * shall be stamped, etc.

The stipulations in the instrument, aside from those which make it a pledge for the payment of a definite and certain sum, are in the nature of a guarantee for unliquidated debts or for liabilities to accrue in future. There is no definite or certain sum stated in the instrument except as to the \$100,000 note, for which the property stands pledged. In this respect the instrument may be treated not as a pledge as contemplated in the war-revenue act, but as an agreement that certain collateral held by the bank shall be held as a basis of credit to the owner, or to meet liabilities depending upon the happening of future contingencies. The property thus deposited and held by the bank may or may not become liable as security for a debt of the owner, or it might, in the business dealings of the owner with the bank, be considered one day as collateral security and another day it would not, for the status of his account could, by deposits or credits, be changed from that of debtor to creditor within a day or even within an hour or less time. It seems, of course, that the instruments or agreements like the one under consideration are made to the bank by patrons and depositors with the view of obtaining credit, and of constituting security to the bank through the means of property held by the bank for the repayment of overdrafts or other indebtedness or liability which may be incurred, but as long as the depositor or patron has funds in bank to meet his checks or drafts, or does not incur liability to the bank by note or other evidence specifying indebtedness, the bank could not hold any security that he had deposited with it under the terms of this paper. It is only when the contingency arises under the terms of the stipulation or agreement that the property deposited with the bank can be held. Before the provisions of the war-revenue act would apply the amount of

the indebtedness must be liquidated and rendered certain, and in order to require a stamp upon the paper which pledges the property for the amount of the debt thus rendered certain, the amount for which the property is pledged must be definitely set forth in the face of the pledge itself, or the instrument pledging the property as security should accompany the note or evidence of debt, the payment of which it is intended to secure.

I am unwilling to construe a paper like the one we are considering as of such character as to require a revenue stamp. Take a case like this: Suppose a man, who has valuable securities, such as Government bonds, etc., desires to obtain credit at a bank; he goes to the bank and deposits these securities as a basis of credit, and he stipulates, as in the case under consideration, that if at any time he should fail to pay any debt he owes the bank, either by note, overdraft, or otherwise, that the bank may hold this property, and, under certain conditions, may sell it to make good the owner's indebtedness. This does not constitute a pledge of property for the payment of a debt such as is contemplated by the act in question. The law does not say that all mortgages and pledges of property shall require a stamp, but only such mortgages and pledges as are made to secure the payment of definite and certain sums of money loaned at the time, previously due and owing, or forborne to be paid, being payable. Mortgages or pledges are sometimes given for indemnity where persons become surety upon official bonds. It is frequently the case that the principal will execute a mortgage or pledge of property to his surety to indemnify him against loss on account of the conduct of the principal. Such mortgage or pledge is not for the security of any sum until the official shall make default and the amount of his default shall be ascertained. Consequently, such instruments do not require a stamp when they are executed, because they are not to secure the payment of a definite and certain sum, but the sum which they are to secure is dependent upon a contingency which may never happen.

The same in case of these deposits. The owner of the property deposited may never become liable to the bank.

He may not make an overdraft or become otherwise indebted to the bank, and if he does, as before stated, how is the amount of the stamp to be determined when the paper itself states no definite or certain sum? Certain instruments and papers are required by the provisions of the war revenue act to be stamped. Still, if a man does not make the instrument or paper, he is not taxed by the law. Promissory notes are required to be stamped, and yet if a man borrows money and does not give a note he does not have to bear the burden of a stamp. So it is as to a lease or agreement made for the renting of land. If it is made in writing it has to have the stamp; but one may rent land by parole, and if he does of course there is no stamp, because the instrument required to be stamped is not executed. And numbers of other cases might be instanced of the same character.

I hold, therefore, that a paper or instrument like this one, stipulating that certain securities or other property shall be held as indemnity or as a basis of credit or a guaranty generally, without specifying particular property as security for the payment of a definite and certain sum, is not liable to tax under the provisions of the war revenue act.

I can not agree to the proposition that the paper or instrument under consideration, in addition to being a pledge of property for the payment of debt, is also to be construed as a power of attorney and stamped as such. A power of attorney is an instrument by which the authority of one person to act in the place and stead of another as attorney in fact is set forth. The language of this instrument does not constitute the party holding the property as security the attorney in fact of the owner. It only authorizes the holder in case of default to make the securities available for the purposes for which they were deposited, and in order to do this authority to sell and to transfer, etc., are given. This is not a power of attorney. It is only a necessary element of the instrument in order that it may be utilized to the end that it was executed.

I do not think it necessary to consider the second instru-

ment or paper submitted, the question involved in it being substantially the same as the one I have discussed.

Respectfully,

JAS. E. BOYD,
Assistant Attorney-General.

Approved.

JOHN K. RICHARDS,
Acting Attorney-General.

The SECRETARY OF THE TREASURY.

VOLUNTEER ARMY—APPOINTMENTS—OFFICERS.

When an organization of State militia, with regimental and company officers bearing commissions from the governor of the State in which organized, is received as a body into the service of the United States under the provisions of the act of April 22, 1898, the officers so commissioned and recognized by the military authorities of the United States remain in their several grades until vacancies contemplated by the law occur, and can not be removed at will by such governor.

DEPARTMENT OF JUSTICE,
September 26, 1898.

SIR: I have the honor to acknowledge receipt of yours of the 25th of August, ultimo, in which you submit for my opinion the facts relating to the captaincy of Company A, in the Fifth Missouri National Guard Regiment, a regiment of Missouri State militia which was accepted into the United States Volunteer Army on the 16th day of May, 1898, and you ask my opinion as to whether Charles F. O'Brien or Charles M. Howells should be recognized by the War Department as the legal captain of the said company.

The facts, as I gather them from the the papers and correspondence on file in this case, are that in the month of April, 1898, after the first proclamation of the President calling for troops for the war with Spain, a regiment of militia was organized in the State of Missouri as the Fifth Regiment of Missouri National Guards. The regimental and company officers of this regiment were commissioned by the governor of the State as such, and according to their several grades, on or about the 30th of April, 1898, and

among them Charles F. O'Brien was commissioned by the governor as captain of Company A in the said regiment.

On the 16th of May, 1898, this regiment, as a body, was tendered by the governor of Missouri, and was accepted by the War Department of the United States, for service in the Volunteer Army under the provisions of the act of April 22, 1898. The officers, regimental and company, including Charles F. O'Brien as captain of Company A, were, on the said 16th day of May, 1898, received with the regiment into the service of the United States according to their several grades, as indicated by the commissions held from the governor, and were so entered upon the army rolls of the United States. This was done with the full knowledge and assent of the governor. The commissions issued to the regimental and company officers of this regiment, as aforesaid, were signed by Lon V. Stephens, who was at that time governor of the State of Missouri, was the governor who tendered the regiment for service in the Army of the United States, and still is governor of Missouri. After the acceptance of this regiment into the Army of the United States, O'Brien continued to be recognized and act as captain of Company A, and to be paid as such by the United States, without interruption, until the 2d of August, 1898, when the governor issued a commission to Charles M. Howells, a lieutenant in the regiment, as captain of Company A in place of O'Brien, who, it was contended by the governor, was not the legal captain. Upon receipt of the governor's commission, Howells qualified and undertook to assume the duties as captain of Company A, when O'Brien declined to surrender, and thus the question is presented as to which one of these men is entitled to the rank and grade of captain of Company A in this regiment.

By the terms of the act of April 22, 1898, the Volunteer Army can be organized only after Congress has authorized the President to raise such a force, or to call into the actual service of the United States the militia of the several States. The President, by his first proclamation, which was issued April 23, 1898, called for 125,000 troops in order to carry into effect the resolution of Congress, which is referred to in the said proclamation. Under this proclamation an esti-

mate was made by the War Department as to the quotas of the several States necessary to constitute the aggregate, and the States were called upon, respectively, to furnish the number required. The Fifth Regiment of Missouri National Guards was tendered to the United States, as before stated, by the governor, and constituted a part of Missouri's quota under this call.

The portion of the act of April 22 which is more particularly involved in this controversy is section 6, and the part of it necessary for consideration reads as follows:

“Provided, That each regiment of the Volunteer Army shall have one surgeon, two assistant surgeons, and one chaplain, and that all the regimental and company officers shall be appointed by the governors of the States in which their respective organizations are raised: Provided further, That when the members of any company, troop, battery, battalion, or regiment of the organized militia of any State shall enlist in the Volunteer Army in a body, as such company, troop, battery, battalion, or regiment, the regimental, company, troop, battery, and battalion officers in service with the militia organization thus enlisting may be appointed by the governors of the States and Territories, and shall, when so appointed, be officers of corresponding grades in the same organization when it shall have been received into the service of the United States as a part of the Volunteer Army.”

The general provision is that all regimental and company officers shall be appointed by the governors of the States in which their respective organizations are raised, and the second proviso is that where a regiment of organized militia of any State, as in this case, enlists in a body, the governor of the State may appoint the officers who are at the time in service with the militia organization, and when so appointed the said officers shall have corresponding grades in the said organization when it shall have been received into the service of the United States as a part of the Volunteer Army. This provision evidently contemplated that regiments of organized militia in the several States could be tendered by the governors to the United States for service, and when such regiments were accepted by the United States they

became for the time being a part of the Volunteer Army of the United States, and the officers holding governors' commissions at the time of such acceptance into the service of the United States were to be recognized by the authorities of the United States as of the rank and grade indicated by their several commissions; and so far as the right of the governors to appoint the regimental and company officers is concerned, the organizations of militia thus constituted and received into the service of the United States continued to retain the distinctive feature of State organizations. It is, therefore, immaterial whether the governors issued commissions to the regimental and company officers of such organizations before or after they were received into the service of the United States as a part of its military force. To say that the enlistment of a State organization like the Fifth Missouri Regiment of National Guards as a part of the Volunteer Army of the United States destroyed its character as a State organization and made it a part of the Army of the United States to the extent that it took away its character as a State organization would at once destroy the right of the governors to appoint regimental and company officers, because the section of the Constitution of the United States which provides for the appointment of all officers of the United States, both civil and military, confines the appointing power to the President, by and with the advice and consent of the Senate, to the President alone, to the courts, and to the heads of Departments. When Congress made the provision of the law respecting the appointment of regimental and company officers in State organizations, it undoubtedly had in view paragraph 16 of section 8, Article I, of the Constitution of the United States, which, under the head of "The Duties and Powers of Congress," reads as follows:

"To provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the States, respectively, the appointment of the officers and the authority of training the militia according to the discipline prescribed by Congress."

The power vested in Congress by this paragraph of the

Constitution is to provide for the organization, etc., of the militia, but the right to appoint the officers, when the militia is organized, is reserved to the States. The act of April 22, 1898, is in harmony with this constitutional provision, in that it provides that the *regimental and company officers shall be appointed by the governors of the States in which the respective organizations are raised*, and, when the organizations are received into the service of the United States, such officers are recognized by the Government as holding grades corresponding with their commissions, and the organizations so received into the service become a part of the Volunteer Army of the United States.

The War Department has recognized, substantially, the principle above laid down in its ruling that, where vacancies occur in the regimental and company offices of these State organizations after they have been accepted for service in the Volunteer Army of the United States, the right still remains to the governors of the States, respectively, in which the organizations are raised, to fill such vacancies.

When the second proviso of section 6 of the act of April 22 was framed and passed into a law, the lawmakers must have contemplated that the organizations would be completed and the regimental and company officers commissioned by the governors of the States, respectively, in which the organizations were raised before the same were received into the service of the United States as a part of the Volunteer Army, for the language of the act is this:

"That when the members of a company, troop, battery, battalion, or regiment of the organized militia of any State shall enlist in the Volunteer Army in a body, etc., the officers in service with the militia organization thus enlisting may be appointed by the governors of the States, and shall, when so appointed, be officers of corresponding grades in the same organization *when it shall have been received into the service of the United States as a part of the Volunteer Army.*"

Language could scarcely be more direct and more readily comprehended as to its meaning than that Congress had in mind when a regiment or other organization, such as is mentioned, was perfected under the State authorities, the

ranks of the companies filled, the regimental and company officers appointed and commissioned, that then it would be in a condition to be tendered to the United States and to be received into the service of the United States as a part of the Volunteer Army. This was the precise condition in which the Fifth Missouri Regiment of National Guards was when it was received into the service of the United States to constitute a part of its Volunteer Army. The regiment was completely organized, the regimental and company officers bore the commissions of the governor of the State, who himself tendered the regiment as a part of his State's quota, thereby inviting the military authorities of the United States to receive it. By this act he in effect said to the War Department of the Government:

"Here is a completed regiment of State militia, which I tender to the United States as an entirety. The regimental and company officers who will present my commissions are those whom I have selected. The organization is ready for active service, and in this condition I ask the authorities of the United States Government to receive it."

I am led into this line of reasoning by the contention in behalf of the claim of Howells, that the governor could not legally commission an officer in this regiment for service in the Volunteer Army of the United States until after the men were all enlisted by the United States and became a part of its army. This carries us back to the position I have taken above, that, if the power of the governor to appoint officers does not arise until the men are enlisted as Federal soldiers, then the power in the governor does not exist at all; that it can only exist and be exercised by the governor because of the fact that the organizations are distinctively creatures of the State and not of the National Government, though, when received by the United States for active service, they become for the time a part of the Army of the United States. In order to uphold the authority of the governor to appoint and to recognize his commissions to regimental and company officers, the regiments themselves must be treated as State and not Federal organizations. Then, if a regiment is completed and the regimental and company officers, at the time the organization is tendered to the United States

for service, hold commissions from the governor of the State in which the regiment is raised, this would seem to be sufficient. The law does not require an unnecessary thing to be done, and if these officers, at the time they are received into the service of the United States, hold commissions from the very authority which the law prescribes, there is no good reason, in my opinion, for the contention that another commission of like character and grade shall be issued.

Then, unless we are to admit that the governor of a State, after he has appointed and commissioned the regimental and company officers in one of these organizations, may, whenever he feels inclined or his whim suggests, make changes by removing one officer and appointing another in his stead, we must hold that when an organization, such as we are considering, with the regimental and company officers bearing the commissions to their respective grades from the governor of the State in which they are organized, is received as a body into the service of the United States under the provisions of the act of April 22, the officers so commissioned and so received and recognized by the military authorities of the United States remain in their several grades and positions until vacancies contemplated by law occur.

As bearing upon the point under consideration, I call attention to the fact that the regiments from the several States received into the service of the United States as a part of the Volunteer Army, under the provisions of the act of April 22, retain the numbers which they held as State organizations, and also the names of the States from which they came, and in this case, as will be observed, the regiment is numbered and named the *Fifth Missouri Volunteer Infantry of the United States Volunteer Army*, and regiments from other States were designated in a like manner, according to the States in which they were organized, respectively.

I therefore advise you that, in my opinion, Charles F. O'Brien is the legal captain of Company A of the Fifth Regiment of Missouri National Guards, which was on the 16th day of May, 1898, received into the service of the

United States as a part of the Volunteer Army of the United States; that the commission issued by the governor of the State of Missouri to the said O'Brien, as captain of the said Company A, before the regiment was tendered to and received into the service of the United States, is in substantial compliance with the requirements of the paragraph of the Constitution of the United States before cited and in accordance with the provisions of the act of April 22, 1898.

Hence I hold that Charles F. O'Brien, and not Charles M. Howells, should be recognized by the authorities of the United States as the captain of the said company.

Very respectfully,

JAS. E. BOYD,

Assistant Attorney-General.

Approved.

JOHN W. GRIGGS.

The SECRETARY OF WAR.

INDIAN COUNTRY—DISTILLERY.

While the general Indian country ceases to be such upon the extinction of the Indian title, the territory as organized and defined by metes and bounds and named Indian Territory does not at all cease to be such upon any such contingency.

The establishment of a distillery on lands in the Indian Territory, although the Indian title thereto has become extinct, is in contravention of law.

DEPARTMENT OF JUSTICE,

October 4, 1898.

SIR: Under date of September 7, 1898, you requested my opinion as to whether there is anything in the laws of the United States in relation to the Indian Territory which prevents the establishment of a distillery on lands therein where the Indian title is extinct, or whether the internal-revenue laws apply as in other portions of the country. (Sec. 3448, Rev. Stat.)

By your communication you refer to section 2141, Revised Statutes, which provides, in substance, that any person who shall, within the Indian country, set up or continue a distillery for the manufacture of ardent spirits shall be liable

to a penalty of \$1,000. And you refer also to the case of *Bates v. Clark* (95 U. S., 204), wherein it was decided that—

“In the absence of different provisions by treaty or act of Congress, all the country described by the first section of the act of June 30, 1834 (4 Stat., 729), as Indian country remains such only as long as the Indians retain their title to the soil.”

Under the section referred to no distillery can be set up or continued in what is “Indian country,” and, under the above decision, what is “Indian country,” if once so, becomes a question of fact, dependent upon whether the Indian title has been extinguished or not.

What was originally Indian country or Indian territory, for the names are used indifferently in the act, is defined by the first section of the act of June 30, 1834, and embraced all that part of the United States west of the Mississippi not included in the States of Missouri or Louisiana or the Territory of Arkansas, and also all that part east of the Mississippi River not within any State, to which, in each case, the Indian title had not been extinguished.

Under the above decision in *Bates v. Clark*, all this territory remains Indian country, except as the Indian title thereto has been extinguished, and as it includes the place where the distillery in question is proposed to be erected, its erection is obviously forbidden by the section above referred to, unless the Indian title there has become extinct in the sense in which that expression is used in the case above cited.

Just to what extent over this vast territory thus described as Indian country the Indian title must be extinguished in order that, under the decision referred to, a particular locality therein shall cease to be Indian country is not apparent. But, in view of the evident object and purpose of Congress in this and kindred legislation to prevent the introduction of intoxicating liquors among the Indians or into localities inhabited by them, it is obvious that much more in this direction is required than that the Indian title shall be extinct as to the particular lot or parcel of land on which the distillery is erected or proposed to be erected.

In view of this and of existing facts in the Indian terri-

tory, the question submitted is somewhat indefinite. You ask in substance whether there is anything in the laws of the United States that prevents the establishment of a distillery in the Indian territory "*on lands therein* when the Indian title is extinct?"

If this means merely that the Indian title to the particular lands on which the distillery is proposed to be erected is extinct, the first part of the question should be answered in the affirmative, while if it means that the Indian title is extinct there over such an extent of territory as that such territory has, under the doctrine of *Bates v. Clark (supra)*, ceased to be Indian country, then the section above referred to does not itself prohibit such distillery.

Historically, the situation appears to be this. Previous to 1887 the only title that the Indians had to their lands in the Indian country or the Indian territory was tribal, when no individual had title to any particular tract, but all was held in common, and the title could be extinguished only by act of the tribe. By the act of February 8, 1887 (24 Stat., 388), a species of allotment to individuals was authorized as to some of the tribes, but did not include the Miamis, Peorias, and some other tribes who occupy the northwestern part of the Indian territory, and it is assumed that the question asked has relation to this small portion of the Indian territory, as this is the only portion of that territory where, in any proper sense, if at all, it can be said the Indian title has become extinct; but the act of May 21, 1889 (25 Stat., 1013), did include these titles, and, under these acts, allotments of land have been made in severalty to the Indians of this portion of the Indian territory. By a later act these Indian allottees were authorized to sell a portion of their allotments, so that each retained 100 acres thereof; and under this power of alienation some of the Indians in that portion of the Indian territory have sold to white persons portions of their several allotments, and, as to these scattered, detached small portions of the Indian territory, the Indian title may be said to be extinct; but the Indians continue to reside there as before, and it would seem to be as much Indian country as ever, within the meaning of these statutes.

It is my understanding that, excepting town sites authorized by Congress, there is no considerable extent or portion of the Indian Territory in which the Indian title has become extinct or that has ceased to be Indian country, or where the prohibition of the section above referred to would not apply.

But the section referred to is not the only one applicable to the case in hand. Besides this and several other sections and acts of Congress applicable generally to the entire Indian country, and showing the careful, persistent, and uniform purpose of Congress to entirely prohibit and prevent the introduction of intoxicating liquors among the Indians or into localities inhabited by them, there are others applicable especially to what is distinctively known as the "Indian Territory," in which the question here arises.

What is known and described in the statutes and generally as the "Indian Territory" was organized and described by metes and bounds by the act of May 2, 1890 (26 Stat., 81, 93, sec. 29), and the territory within those bounds is just as much a separate, distinct, integral part of the United States as is the State of Kansas or Territory of Arizona, and, while within the general description of Indian country as defined by section 1 of the act of 1834, is yet governed for the most part by laws applicable to that Territory alone. Nor does its existence or status of the "Indian Territory" depend at all upon the continuance of the Indian title to the land or upon the fact that any Indians remain there. On the contrary, although the Indian title had become extinct as to every foot of land in the Territory, and although there was no longer an Indian there, still the laws applicable to that Territory would continue in force as before until repealed or changed, except, of course, those relating to the Indians. While the general Indian country ceases to be such upon the extinction of the Indian title, this Territory, as organized and defined by metes and bounds and named the "Indian Territory," does not at all cease to be such upon any such contingency, and laws applicable to that Territory continue to govern it, no matter who owns the soil, excepting, as before, laws relating peculiarly to Indians. It follows, therefore, that if there be any law prohibiting the

introduction of intoxicating liquors into that Territory, such prohibition does not cease with the extinction of the Indian title.

Section 8 of the act of March 1, 1895 (28 Stat., 693-697), which refers and applies specially to the Indian Territory, provides that—

“Any person, whether an Indian or otherwise, who shall in said Territory manufacture, sell, give away, or in any manner, or by any means, furnish to anyone, either for himself or another, any vinous, malt, or fermented liquors, or any other intoxicating drinks, of any kind whatsoever, whether medicated or not, or who shall carry, or in any manner have carried, into said Territory any such liquors or drinks, or shall be interested in such manufacture, sale, giving away, furnishing to anyone, or carrying into said Territory any such liquors or drinks, shall, on conviction thereof, be punished by fine not exceeding five hundred dollars, and by imprisonment for not less than one month nor more than five years.”

As this section forbids the introduction into the Territory thus described, defined, and named as above stated, its prohibition does not cease with the extinction of the Indian title nor the removal of the Indians, but continues in force until repealed, without reference to either, and the erection of a distillery in this Indian Territory would be as unlawful after such contingency as before.

I am therefore of opinion that both under the laws relating generally to the Indian country and those relating especially to the Indian Territory, to which the question refers, the establishment of the proposed distillery would be in contravention of law.

Very respectfully,

JOHN W. GRIGGS.

The SECRETARY OF THE TREASURY.

DISTRICT OF COLUMBIA—NAVAL MILITIA—OFFICE.

The resignation of a military office does not take effect until accepted by the proper superior authority.

The acceptance by the commanding general of the National Guard of the District of Columbia of a commission as colonel in the Volunteer Army, for service in the war with Spain, did not operate as a vacation of the District command.

Such commanding officer is authorized, under the act of May 11, 1898, to nominate candidates for appointment as officers in the naval battalion.

Incompatibility in law exists where the nature and duty of the two offices are such as to render it improper, from considerations of public policy, for one incumbent to hold both, and does not necessarily arise when the incumbent places himself for the time being in a position where it may be impossible for him to discharge the duties of both offices.

DEPARTMENT OF JUSTICE,

October 4, 1898.

SIR: I am in receipt of your communication of the 20th ultimo, in which you request the opinion of the Attorney-General upon the question whether George H. Harries, who was appointed and commissioned by the President commanding general of the militia of the District of Columbia prior to the war with Spain, but who accepted from the President a commission as colonel of a volunteer regiment composed largely of the officers and men of the militia of the District of Columbia, organized under the act of April 22, 1898 (30 Stat., 361), providing for the increase of the military establishment of the United States in time of war, is now the commanding general of the militia of the District of Columbia, authorized under the act of May 11, 1898 (30 Stat., 404), providing for the organization of a naval battalion in the District of Columbia, to nominate candidates for appointment as officers in such naval battalion.

The act of March 1, 1889, for the organization of the militia of the District of Columbia (25 Stat., 772) provides (section 6) "that the President of the United States shall be the commander in chief of the militia of the District of Columbia," and (section 7) "that there shall be appointed and commissioned by the President of the United States a commanding general of the militia of the District of Columbia,

with the rank of brigadier-general, who shall hold his office until his successor is appointed and qualified, but may be removed at any time by the President."

General Harries was in command of the District militia when the war with Spain was declared. He held this office at the pleasure of the President, being removable at any time. His term was to last until his successor should be appointed and qualified. This being the situation, the President appointed and commissioned him colonel of the volunteer regiment organized in the District. He accepted this commission, but did not resign the command of the District militia. Was the President bound to treat his acceptance as a vacation of the command of the District militia and appoint his successor?

I think not. There is no statutory prohibition against the holding of the two offices. Is there any incompatibility in law? Incompatibility exists where the nature and duty of the two offices are such as to render it improper, from considerations of public policy, for one incumbent to hold both. It does not necessarily arise when the incumbent places himself, for the time being, in a position where it may be impossible for him to discharge the duties of both offices. (*Bryan v. Cattell*, 15 Iowa., 538, 550; 1 Dill. Mun. Corp. sec. 227, note). By accepting the volunteer commission General Harries did not subject himself to a conflicting authority, for he received it from his commander in chief, the President. Moreover, in accepting it, and retaining command of that portion of the District militia which responded to the call of the President and entered the service of the United States, he was simply doing one of the things for which he had been made commanding general. The District militia, organized under the act of March 1, 1889, are subject to be called into the service of the United States (sections 4 and 5). In case of such call the National Guard, being the active militia, are the first to be ordered into the service (section 10). No officer or soldier of the National Guard, when ordered into the service of the United States in obedience to the call of the President, shall be excused from such duty except upon the certificate of a surgeon (sec. 45). The reading of the entire act of March 1, 1889, is convincing upon the point, that one of the

objects for which the District militia was organized is to meet any call for service from the United States through the President.

The act of April 22, 1898, authorized the President to create a Volunteer Army, and for that purpose to require each State and Territory and the District of Columbia to furnish its quota. Under this authority the President made a call upon the District of Columbia. One regiment was required. It was only natural that the commanding general of the district militia should be the colonel of this regiment, made up of officers and men from his command. It is true that the service of the United States took him out of the District, but mere absence from the District would not in itself amount to an abandonment of the District command. Suppose that, with the approval of the President, he had gone abroad for several months to observe military operations there. Such absence, instead of indicating an intention to abandon his command, might be taken for the express purpose of improving himself in military science, so as the better to exercise the command. And so with the experience in actual war gained in Cuba.

Moreover, absence from the District would not of necessity interfere with the discharge of the duties of commanding general of the District militia. During a temporary absence of a commanding general his subordinates at home might under his direction discharge all the duties required of him. The war itself might last but a few months, and the matter of appointing his successor, and the successors of the officers who accompanied him, might well be left in abeyance to await the issue of the war. This, it now appears, was what was done. There being no incompatibility in the two offices, the acceptance of the volunteer commission could not operate as a vacation of the District command, unless the President saw fit to treat it as the equivalent of a resignation and accept it by appointing a successor; for the resignation of a military office does not take effect until accepted by the proper superior authority. (*Mimmack v. United States*, 97 U. S., 426.)

The question, then, finally resolves itself into one of expediency—what was best for the public and for the District militia

under all the circumstances. This question of expediency was for the President to determine in view of the situation presented. Whether the public interests required that the National Guard be reorganized and the places of those absent in Cuba treated as vacant and filled, or that those who had responded to a patriotic call in the line of military duty be regarded as temporarily absent on leave and their places reserved for their return, was for the President, as Commander in Chief, to determine. The fact that the President did not appoint a successor to General Harries may be taken as a sufficient indication that he saw fit to take the latter view.

It is, therefore, my opinion that General Harries is the commanding officer of the National Guard of the District of Columbia, authorized, under the act of May 11, 1898, to nominate candidates for appointment as officers in the naval battalion.

Respectfully,

JOHN K. RICHARDS,
Solicitor-General.

Approved.

JOHN W. GRIGGS.

The SECRETARY OF WAR.

REVOCABLE LICENSES.

The granting of a revocable license to the Washington and Glen Echo Railway to lay a single track on the Aqueduct Reservation near Cabin John Bridge does not conflict with the acts of July 29, 1892, and June 3, 1896, authorizing the construction of the Washington and Great Falls Railway Company and providing that there shall be but one railway parallel to and near the Conduit road.

The license granting the right to construct the road should contain such restrictions or regulations as may be necessary to fix its location and protect Government property.

The granting of a revocable license subject to termination at any time at the will of the Government confers no contractual right upon the licensee.

The open and notorious use of Government reservations by licensees for other than governmental purposes, and the long-continued exercise of the power to grant such use by the Secretary of War without legislative objection implies the tacit assent of Congress to this custom, but it can not be maintained upon any ground except that of benefit to the public interests.

DEPARTMENT OF JUSTICE,

October 6, 1898.

SIR: By your communication to me, under date of September 10, 1898, you ask my opinion upon certain questions arising out of certain facts, which in your letter are stated as follows:

"On June 22, 1898, application was made to this Department by the Washington and Glen Echo Railroad Company for permission to lay a single track on the lands of the United States known as the Washington Aqueduct Reservation, near Cabin John Bridge, Montgomery County, Md.

"After the usual procedure in such cases a 'revocable license' was granted and issued on the 3d instant, but in view of certain legal considerations since presented, upon which your opinion is desired, the license has been suspended.

"The Washington and Glen Echo Railroad Company is a corporation organized under the laws of the State of Maryland. By the act of May 7, 1898 (30 Stat., 399), the company was authorized to obtain a right of way and construct tracks into the District of Columbia.

"The Washington and Glen Echo Railroad Company has its eastern terminus at or near the northern boundary of the District of Columbia in Chevy Chase, and runs thence to Idylwood, in Montgomery County, Md., about 600 yards from Cabin John Bridge.

"The railroad company now seeks to extend the tracks of the road from the present stopping place to Cabin John Bridge, and for this purpose desires to lay a track upon a portion of the Washington Aqueduct Reservation for a distance of about 300 feet. The portion of the reservation included in the terms of the revocable license (which has been suspended) and on which the proposed track is to be constructed, commences at a stone marked 'W. A. N. 39,' and runs west for a length of 300 feet to an extreme width of 22 feet. As shown by the report of Lieut. Col. A. M. Miller, with the papers herewith transmitted, the proposed track is to be laid on a trestle. It is further shown by the tracings herewith that the proposed track is near to the Conduit road and parallel to or in the same direction with said road.

“By the act of Congress approved July 29, 1892 (27 Stat., 326), entitled ‘An act to incorporate the Washington and Great Falls Electric Railway Company,’ it was provided—

“‘That there shall be but one railway parallel to and near the Conduit road, and there shall never be more than one double track on or over the Canal road, and all act or parts of acts granting the use of the surface of the Canal road or any part thereof for laying railway tracks thereon and operating cars thereon are hereby repealed; and wherever the route specified in this act is parallel with or coincides with the route of any other railway the two companies shall maintain and use but one set of double tracks, and any violation of this provision by the said Washington and Great Falls Electric Railway Company shall operate as a repeal of this charter; and matters of dispute between the companies respecting railways parallel to the Conduit road and affecting the same, whether in the District of Columbia or in Maryland, shall be referred to and determined by the Secretary of War, and matters in dispute between the companies respecting railways on the Canal road shall be determined upon the application of either road to any court in the District of Columbia having competent jurisdiction.’”

“The act of June 3, 1896 (29 Stat., 246), entitled ‘An act to amend an act entitled “An act to incorporate the Washington and Great Falls Electric Railway Company,”’ provides—

“‘That there shall be but one railway parallel to and near the Conduit road; and wherever the route specified in this act is parallel with or coincides with the route of any other railway the two companies shall maintain and use but one set of double tracks, and any violation of this provision by the said Washington and Great Falls Electric Railway Company shall operate as a repeal of this charter; and matters of dispute between the companies respecting railways parallel to the Conduit road, and affecting the same, in the District of Columbia, shall be referred to and determined by the Secretary of War; and matters in dispute between the companies respecting railways on the Canal road shall be determined upon the application of either road to any court in the District of Columbia having competent jurisdiction.’”

The questions submitted for my opinion upon this state of facts are as follows:

1. "Will the granting of a revocable license to the Washington and Glen Echo Railroad Company, for the purpose indicated, conflict with the law hereinbefore cited (acts July 29, 1892, and June 3, 1896), providing that 'there shall be but one railway parallel to and near the Conduit road'?"

2. "There being matters of dispute between the two companies named, respecting a proposed railway parallel to the Conduit road, is the Secretary of War authorized to determine the same?"

"The act of July 29, 1892, hereinbefore cited, provides that 'matters of dispute between the companies respecting railways parallel to the Conduit road, and affecting the same, whether *in the District of Columbia or in Maryland*, shall be referred to and determined by the Secretary of War,' while the later act of June 3, 1896, provides that 'matters of dispute between the companies respecting railways parallel to the Conduit road, and affecting the same, *in the District of Columbia*, shall be referred to and determined by the Secretary of War.'

3. "Should a revocable license be granted to the said company, would the company be legally restricted as to the distance of the inner side of its railway from the middle of the paved portion of the Conduit road, by reason of the provision contained in the act of June 3, 1896, hereinbefore cited; and if so, to what extent?"

I answer your first question in the negative. I am of the opinion that the proviso in the charter of the Washington and Great Falls Railway Company, and the acts amending that charter, is merely a restriction or limitation upon the company created by said acts, and refers merely to the location of the road to be constructed and operated by it. I do not think that it was intended to operate as a restriction upon any power of granting a revocable license which may exist in the Secretary of War.

I think also that this proviso related to the establishment of a permanent line of railway parallel to and near the Conduit road, and not to the mere maintenance, for temporary

purposes, of a road possessing no better title than such revocable license as your Department can lawfully grant.

"There being matters of dispute between the two companies named, respecting a proposed railway parallel to the Conduit road, is the Secretary of War authorized to determine the same?"

The provision of the amendatory act of June 3, 1896, as to this is thus stated, as part of the sentence last quoted: "And matters of dispute between the companies respecting railways parallel to the Conduit road, and affecting the same, in the District of Columbia, shall be referred to and determined by the Secretary of War."

I do not think this provision, or any other provision in that act, confers upon the Secretary of War any jurisdiction to either grant or refuse any such license as is now under consideration, but that whatever jurisdiction he may have in the premises is independent of this statute.

The jurisdiction conferred by this act is expressly limited to cases arising in the District of Columbia, where only Congress has power to enact such laws. The original act of July 29, 1892 (27 Stat., 326), provided that "all such disputes, whether in the District of Columbia or Maryland," shall be thus referred to and determined by the Secretary of War; while the amendatory act eliminates Maryland and confines such jurisdiction to cases arising within the District of Columbia.

While this is abundantly sufficient, the same conclusion would result even without this local limitation in the statute; for the jurisdiction to hear and determine the matter and to grant such license must exist, if at all, when application for the license is made, and can not be conferred by or made to depend upon the subsequent fact that afterwards some other company files a protest, thereby creating a dispute between two companies, for if it did the Secretary would have no power to hear or determine the matter, or to grant such license, unless some other company should oppose it. I do not think the act in question has any relation to the question of whether the Secretary of War shall or shall not grant such license as is here asked for.

Inasmuch as the power of the Secretary of War, independently of any express authority by statute, is involved in the application now pending, it seems appropriate that I should call to your attention a consideration in connection with the power and practice of the Secretary of War with reference to such matters.

The right of an Executive Department of the Government to grant permission for the use of any part of the Government lands, except for Government purposes, has been several times considered by the Attorney-General. (16 Opin., 206; 19 Opin., 628; 20 Opin., 93; 21 Opin., 537.) In no instance that I know of has any Department assumed to grant anything more than a mere revocable license, subject to termination at any time at the will of the Government. That such license conferred no contractual right upon the licensee has been universally asserted by every Attorney-General who has had occasion to pass upon such concessions. When, in 1869, a license was granted to a railroad company to use a part of the Government land at Sandy Hook for railroad tracks, the license was expressly granted for "so long as it may be considered expedient and for the public interest by the Secretary of War or other proper officer of the Government in charge of the United States lands at Sandy Hook." Under a similar license a part of the land belonging to the Fortress Monroe Reservation, at Old Point Comfort, was allowed to be used as a site for a hotel. In the same way the Secretary of War has granted licenses to construct and maintain an irrigation ditch through the military reservation at Fort Selden, N. Mex., the licensee furnishing free to the United States all the water required for military purposes.

Long-continued exercise of a power of this kind by the Secretary of War, and the open and notorious use of Government reservations by such licensees without legislative objection from Congress and without the adoption of any legislative rule upon the subject, implies the tacit assent of Congress to this custom. At the same time, I deem it proper to call your attention to the fact that this custom can not be maintained upon any ground except benefit to the

public interests, either directly or indirectly. It can not be used as a basis for granting, under the guise of a temporary license, a substantially permanent right to maintain a railroad.

I think, under the practice of the Departments, if the Government property will not be injuriously affected thereby, and if the temporary operation of such a railroad will be of general or special benefit to the public interests, it would be proper to permit the applicant to maintain temporarily its tracks in such manner as your Department may decide to be consistent with the preservation and safety of the aqueduct property; but if the applicant conceives that by the grant of such license it can obviate the necessity of obtaining the consent of Congress to a permanent use of the Government land for such an object it ought to be disabused of such an impression. If there is a direct, visible benefit to the property under your charge which will arise out of the maintenance of such a railroad as the applicant proposes to operate, then it would be proper for you to consent to the construction and operation of such railroad so long as the Government received such direct benefit; but if the operation of the railroad is only valuable on account of general public benefits, then the grant ought not to be extended for a longer time than may be necessary reasonably to accommodate the temporary purposes of the applying company.

I answer your third question in the negative; and would add that whatever restriction or regulations are proper in this respect for the protection of the water main under the Conduit road, or other Government property, or for any other purpose, should be stated in the license granted. This is upon the assumption that the acts referred to do not govern such a case further than to indicate the design of Congress to protect Government property and rights.

Very respectfully,

JOHN W. GRIGGS.

The SECRETARY OF WAR.

STAMP TAX—BAGGAGE RECEIPT.

An excess-baggage receipt issued by a railroad company to a passenger for excess weight of baggage does not require a stamp under the war-revenue law.

DEPARTMENT OF JUSTICE,

October 7, 1898.

SIR: I have the honor to acknowledge yours of the 3d instant, transmitting a copy of a letter from the Commissioner of Internal Revenue, and also inclosing a form of an excess-baggage receipt issued by railroad companies to passengers for excess weight of baggage, and you ask my opinion as to whether such receipt is subject to stamp tax under Schedule A of the war-revenue act.

I do not think that baggage received by a railroad company and carried upon the same train with the owner, who is a passenger, in the usual way in this country, can be included under the head of "Express and freight," as contemplated in the war-revenue act, whether such baggage be the quantity allowed ordinarily by the rules of the railroad company or is in excess of such amount.

The consideration to the carrier for the transportation of baggage is the fact that the owner is a passenger, and it is a part of the consideration of the ticket which the passenger holds that his baggage shall be carried along with him. If, however, a passenger has more baggage than is allowed by the rules on account of an ordinary ticket, it does not change the character of the baggage nor the nature of the contract with the passenger for the carrier to require a greater amount of fare. If we were to hold that the receipt given for excessive weight of baggage is liable to the stamp upon the ground that goods are accepted for transportation, we should also have to hold that the check given for any baggage should have the stamp, for the law does not make any difference whether the goods accepted for transportation are in large or small quantities. The transportation of baggage is a privilege extended to a passenger aboard the train, in consideration of the fact that the passenger himself is entitled to be carried. So really it is the fact that the passenger himself, and not his baggage, is accepted by the carrier for transportation that forms the basis of the contract.

I therefore advise you that a check such as you inclose, given to denote that the carrier is conveying for the passenger an amount of baggage in excess of that allowed by the rules, in consideration of an ordinary ticket, and for which

the passenger pays an amount greater than the usual fare, is not a bill of lading or manifest for goods accepted for transportation as contemplated under the head of "Express and freight" in the war-revenue act.

Very respectfully,

JAS. E. BOYD,
Assistant Attorney-General.

Approved.

JOHN W. GRIGGS.

The SECRETARY OF THE TREASURY.

STAMP TAX—REBATE CHECKS.

Rebate checks which are given by a railroad company to passengers who purchase their tickets from the conductor aboard the train do not require a stamp under the provisions of the war-revenue law.

DEPARTMENT OF JUSTICE,
October 10, 1898.

SIR: I have the honor to acknowledge receipt of yours of the 4th instant, inclosing copy of a letter of the Commissioner of Internal Revenue, dated October 1, 1898, in which you request my opinion as to whether or not what are called "rebate checks," issued by the railroad companies, are required to be stamped, under the provisions of the war-revenue act, as orders for the payment of money.

Rebate checks, as they are called, are used by the railroad companies in cases where passengers without tickets purchased at regular stations pay fare to conductors aboard the train. The purpose of these checks, as it appears, is twofold: First, to induce passengers to buy tickets before going aboard passenger trains and thus avoid the inconvenience of having refunded an extra charge; and in the second place, to furnish evidence to the railroad companies that cash fares have been paid to conductors, so as to be a check upon their reports. The plan is to require the passenger to pay more than the price of a ticket purchased at a station, and the conductor to whom it is paid gives to the passenger what is called a rebate check, which is redeem-

able at a ticket office of the railroad company for the amount paid by the passenger over and above the regular fare.

These checks, I advise you, are not orders for the payment of money, as contemplated by the war-revenue act. They are not drawn by one person or company upon another. They are more in the nature of transactions of a railroad company with itself, in which the passengers are used as instruments to carry them out. The company gives to the passenger a check, by which the same company agrees to refund an amount of money which the passenger has paid, provided the check is presented at a certain place within a specified time. Such checks, given under these circumstances, do not, in my opinion, require a stamp under the provision of the act referred to.

Respectfully,

JAS. E. BOYD,

Assistant Attorney-General.

Approved.

JOHN K. RICHARDS,

Acting Attorney-General.

The SECRETARY OF THE TREASURY.

HAWAIIAN ISLANDS—CHINESE.

The laws of the United States affecting the Hawaiian Islands, as well as the laws of such islands, are to remain generally undisturbed by reason of the resolution of annexation, until Congress provides a government therefor.

Any law of the Hawaiian Islands inconsistent with the terms of the resolution of annexation is invalid and inapplicable. The restrictions placed upon the admission to the United States of Chinese persons of the exempt class, and the regulations affecting the departure and return to this country of registered Chinese laborers, are to be held applicable to Chinese persons applying for admission to the Hawaiian Islands or to such persons residing there who may wish to depart with the intention of returning.

DEPARTMENT OF JUSTICE,

October 21, 1898.

SIR: I have the honor to acknowledge the receipt of your communication of October 11, with its inclosures, in relation to the status of the Chinese in the Hawaiian Islands,

and with particular reference to their entrance into and exit from said islands. In view of the provisions of the joint resolution approved July 7, 1898, annexing the Hawaiian Islands, you desire my opinion on the question whether or not the restrictions placed by the Chinese exclusion laws upon the admission of Chinese persons of the exempt class, and the regulations made under the provisions of the treaty between the United States and China providing for the departure from and return to this country of registered Chinese laborers, are to be held applicable to Chinese persons applying for admission to the Hawaiian Islands, or to such persons residing there and who may wish to depart with the intention of returning; and in connection with this question you call my attention to a recent law passed by the Hawaiian legislature, a copy of which you inclose, amending the Hawaiian Chinese immigration acts.

I understand generally from the papers submitted, although you do not so state, that in certain respects the Hawaiian Chinese immigration laws are more stringent, and in certain other respects are more liberal, than our own; and I may state here that in due time and in pursuance of constitutional methods Congress may modify, enlarge, or restrict the application of our Chinese laws to the Hawaiian Islands, in view of the special or peculiar circumstances existing there affecting the rights and liabilities of persons of Chinese birth or descent.

But the present question is, how does the case stand now? In an opinion dated July 22, 1898, relative to the collection of tonnage tax upon vessels coming to the United States from Hawaiian ports, I was of the opinion, considering the terms of the Hawaiian resolution and the fact that no language was used therein indicating an intention to change the relations of our tonnage-tax laws to Hawaiian ports and vessels coming from them, that Hawaiian ports were foreign ports within the meaning of those laws, and that the previous relations of the two countries should be regarded as continuing for the present, and upon this question I used the following language:

“If we should hold the previous relations of the two countries altered as suggested, we should vainly look through

the resolution for any adequate provision for enforcing such laws as are supposed to apply to the islands. No arrangement is made for collecting our tonnage tax upon vessels of other countries entering Hawaiian ports, nor is any other tax law or other law of the United States, unless it be the law prohibiting Chinese immigration, expressly or impliedly furnished with instrumentalities for its execution."

And I reach the conclusion in that opinion that Congress in respect to this and other questions has affirmatively indicated its intent that our laws (and I may now add the Hawaiian laws) are to remain generally undisturbed by the annexation of the islands until "Congress shall provide a government for such islands," or until a commission shall advise and Congress enact "such legislation concerning the Hawaiian Islands as they shall deem necessary or proper."

With reference to Chinese immigration, however, I find, as indicated in the said opinion, a clear intention on the part of Congress to make that question an exception and to apply at once the Chinese exclusion laws of this country to the Hawaiian Islands. The language of paragraph 8 of the resolution of July 7, 1898, is as follows:

"There shall be no further immigration of Chinese into the Hawaiian Islands except upon such conditions as are now or may hereafter be allowed by the laws of the United States; and no Chinese, by reason of anything herein contained, shall be allowed to enter the United States from the Hawaiian Islands."

The question, therefore, of diverse provisions affecting Chinese relative to those islands and of enlarging, modifying, or restricting in relation thereto the privileges and prohibitions of our Chinese exclusion laws must be committed to Congress, and until Congress shall see fit to take further action, I am of the opinion that the foregoing portion of the Hawaiian resolution fully covers the case. If, as is to be inferred from your communication, the laws passed by the Hawaiian legislature, including the recent law which you submit, relative to Chinese immigration to those islands are inconsistent with the terms of the resolution, they must be held to be so far invalid and inapplicable, either as being thus far supplied by the provision of the resolution or as

being thus far totally inconsistent therewith and repugnant thereto.

I therefore respond to your request by stating that in my opinion the restrictions placed by our exclusion laws upon the admission of Chinese persons of the exempt classes, and the regulations made under the provisions of the treaty between the United States and China providing for the departure and return to this country of registered Chinese laborers, are to be held applicable to Chinese persons applying for admission to the Hawaiian Islands or to such persons residing there and who may wish to depart with the intention of returning.

I return the inclosures of your letter herewith.

Very respectfully,

JOHN K. RICHARDS,
Acting Attorney-General.

The SECRETARY OF THE TREASURY.

STAMP TAX—BILLS OF LADING.

The term "accepted for transportation" as used in the war-revenue law means goods received from a shipper or consignee other than the carrier itself, and is intended to apply to goods received for transportation in the usual manner by common carriers.

Money and merchandise carried by the Adams Express Company for the Pennsylvania Railroad Company over the lines of the latter, free of charge, under a contract between the two companies, do not require a bill of lading or manifest under the provisions of the war-revenue law, and, if given, it is not liable to a stamp tax.

DEPARTMENT OF JUSTICE,
October 21, 1898.

SIR: I have the honor to acknowledge receipt of yours of the 18th instant, inclosing copy of letter of the Commissioner of Internal Revenue, and also a copy of a letter addressed to the Commissioner of Internal Revenue by the general solicitor of the Pennsylvania Railroad Company, in which you request my opinion as to whether goods, such as money and merchandise, which are carried by the Adams Express Company free for the Pennsylvania Railroad Company, under a contract between the two companies, are included under the

head of "Express and freight" in the war-revenue act, and whether the manifest or other paper evidencing the transportation thereof is subject to the stamp provided for in said act.

The facts relating to this question, as submitted, are as follows:

"*First.* By agreement, dated November 25, 1896, between the Pennsylvania Railroad Company and the Adams Express Company, by virtue whereof the latter conducts its business on and over the lines of railroad operated by the former, and the lines of railroad or other companies affiliated with said railroad company, it is, *inter alia*, stipulated as follows: That the express company shall 'carry for the railroad company all money and other valuable packages pertaining to the business of the railroad company over the lines of the latter free of charge, the railroad company assuming all risk of loss or injury thereto of property so carried, except through theft or dishonesty, carelessness or inefficiency of the employees of the express company; and it being understood that, for this purpose, the lines covered by this agreement, and those covered by the agreements of even date herewith with the other companies affiliated with the railroad company, shall be considered as forming one system; such money and valuable packages shall be carried free of charge over such lines for any of the companies whose lines form part of that system.'

"*Second.* That the money packages and other valuable packages covered by the said agreement, and by its terms to be carried free of charge, are *exclusively* the *property* and appertain wholly to the business of the railroad companies, and the transportation thereof is incidental to and absolutely necessary for the efficient management and operation of the railroad companies, and the proper administration of their business.

"*Third.* That the carriage thereof is made in the cars of the railroad companies, which are hauled by their own motive power, and frequently in charge of one person, who is the agent of both the express and railroad companies; and, but for the existence of the said contract, would be carried in like manner, save only that the exclusive em-

ployee of the railroad company would have custody thereof during such carriage."

Under the head of "Express and freight," which is a part of Schedule A of the war-revenue act, it is made the duty of every railroad or steamboat company, carrier, express company, or corporation or person whose occupation it is to act as such, to issue to the shipper or consignor, or his agent, or person from whom any goods are accepted for transportation, a bill of lading, manifest, or other evidence of receipt and forwarding for each shipment received for carriage and transportation, and upon such bill of lading, manifest, etc., is required a stamp of the value of 1 cent.

The term "accepted for transportation," as used in the statute, evidently means goods received from a shipper or consignor other than the carrier itself, for one can not be said to accept goods from himself, and the term must have been intended to apply to goods received for transportation in the usual manner by common carriers.

The goods and moneys of the railroad company, by virtue of the contract above set forth, are carried in its own cars, on its own railway, in trains moved by its own locomotives, operated by its own servants. The employees of the express company, it is true, handle the goods and moneys, but, under the contract, they do so in a sense as the agents of the railroad company. The relation of shipper and carrier as usually applied does not, and can not, under the circumstances be said to exist between the two companies.

In 21 Opinions, 394, will be found an opinion of the Attorney-General, in which the principle involved is somewhat analogous. The question there was as to the right of railroad companies to carry letters pertaining to their own business, and, whilst it is held (under sections 3985 and 3993, Revised Statutes, which are revenue laws) that the public interest requires that the Government should have a monopoly of the business of carrying letters, the law is construed to authorize letters and packets relating to the business of the railroad on which they are carried to be carried by such railroad outside of the mails and not in Government stamped envelopes.

I advise you, therefore, upon the facts presented in the case submitted by you, that no bill of lading or manifest is

required under the provisions of the war-revenue act, and if any such is given it is not liable to the stamp provided in said act.

Respectfully,

JAS. E. BOYD,
Assistant Attorney-General.

Approved.

JOHN. K. RICHARDS,
Acting Attorney-General.

The SECRETARY OF THE TREASURY.

LEAVES OF ABSENCE.

Sixty days' leave of absence, with pay, may be granted employees in the Executive Departments, provided that as much as thirty days of it was made necessary by personal illness.

The act of July 7, 1898, nullifies so much of the act of March 15, 1898, as provides that the thirty days' sick leave shall only be granted with pay in exceptionally meritorious cases, and reestablishes the law authorizing thirty days' annual leave with pay without any cause being given, and thirty days' additional leave on account of sickness.

DEPARTMENT OF JUSTICE,
October 25, 1898.

SIR: I have the honor to acknowledge receipt of your communication of October 7, requesting my opinion upon the provisions of the statute of March 15, 1898, which provides that the head of any department may grant thirty days' leave with pay in any one year to each clerk or employee, and also that in exceptional and meritorious cases, where a clerk or employee is personally ill, and where to limit the annual leave to thirty days would work peculiar hardship, the leave may be extended with pay, not exceeding thirty days.

You also request my opinion as to the effect upon the act above stated of the provisions of the later act of July 7, 1898, which provides that nothing contained in section 7 of the act of March 15, 1898, shall be construed to prevent the head of the Department from granting thirty days' annual leave with pay to a clerk or employee, notwithstanding the clerk or employee may have had not exceeding thirty days' leave with pay on account of sickness.

You accompany your request with an opinion communicated to you by the Judge-Advocate General, which states the case and the principles of law to be applied and the proper conclusions therefrom so satisfactorily and so in accord with my own views that I quote the same, as follows:

"In this case Mr. H. M. Shannon, a clerk of the Record and Pension Office, is stated to have been absent during the present year thirty-nine days, with pay, on account of sickness; and the question has arisen as to whether he is entitled to twenty-one days additional as annual leave.

"In my opinion the substance of the two acts taken together is that a clerk may be granted as much as sixty days' leave with pay in the whole year, provided that as much as thirty days of it was made really necessary by his personal illness. In other words, he may be granted as much as thirty days without any cause given (called in the statutes 'annual leave'), and he may be granted this notwithstanding he 'may have had' not exceeding thirty days' sick leave. And if he shall take his thirty days' annual leave and then become sick afterwards, he may be granted leave on account of his sickness for as many days as he may be sick up to thirty days.

"Mr. Shannon was absent sick more than thirty days—i. e., it is said he was absent sick thirty-nine days—and was paid for the whole time. It is assumed that he was paid for thirty days of the time because his absence was made necessary by sickness, and for the other nine on account of annual leave, notwithstanding he was sick at the time.

"It is further asked in the first indorsement hereon whether the 'exceptional, meritorious, etc., provisions of the said act of March 15, 1898,' are nullified by the later act. In my opinion they are. Under either act the head of the Department may grant as much as sixty days, under certain circumstances named. Clearly one of the objects of the later act was to authorize the annual leave to be granted *after* the sick leave had been taken, for it provides that it may be granted, notwithstanding the applicant 'may have *had*' not exceeding thirty days' sick leave. In fact, this seems to be the principal, if not the sole, object of the last act.

"Now, the first act provided, in substance, that the sick leave should be an *extension* of the *annual* leave, and that

this extension of the annual leave should not be granted with pay unless the circumstances of the case were of such exceptional and meritorious character as to make it a hardship not to grant it.

"And if the sickness comes before the annual leave is taken it can not be determined at the time the sick leave is taken whether or not it would work a hardship not to *extend* the annual leave on account of it. If, for instance, the clerk is sick ten days early in the year, and before the annual leave is taken, it could not be determined then whether it would be a hardship to deduct the time from his thirty days' annual leave or not, because it could not be determined then whether the person would need more than twenty days' annual leave that year or not. Therefore, to provide that the sick leave may be granted first and thirty days' annual leave afterwards makes it impracticable to apply the said exceptional and meritorious, etc., clause or provision of the act of March 15, 1898. And to so legislate as to prevent the application of previous legislation is to repeal the previous legislation by implication.

"I am, therefore, of the opinion that, taking the whole of the law as it stands now, and construing it together, it is proper to hold that it reestablishes the old and simple law and custom of the Department to the effect that the Secretary of War may (through the heads of bureaus or personally) grant clerks and employees thirty days' leave with pay each year without any cause being given, and may also, aside from that, grant the applicant leave with pay during such time as he is compelled by sickness to be absent, up to as much as thirty days."

The conclusions reached by the Judge-Advocate-General are, in my opinion, sound and correct, and you are therefore advised accordingly.

Very respectfully,

JOHN W. GRIGGS.

The SECRETARY OF WAR.

7843—VOL 22, PT 1—17

ARMY OFFICERS—SUSPENSION OF HOSTILITIES.

The suspension of hostilities provided for by the protocol of agreement between the United States and Spain is not tantamount to the termination of the war, but creates only an interval in the war and supposes a return to it.

Officers exercising, under assignment in orders, a command above that pertaining to their grade, in connection with the Army of the United States, if performing no other service of a domestic nature, but held in readiness to resume hostilities, are entitled to the increased pay and allowance provided for by the act of April 26, 1898.

DEPARTMENT OF JUSTICE,
October 26, 1898.

SIR: Under date of October 24, 1898, you request my opinion as to whether, in view of the suspension of hostilities between the United States and Spain at the present time, there are any United States troops that can be said to be operating against an enemy within the meaning of section 7 of the act of Congress for the better organization of the line of the Army of the United States, approved April 26, 1898.

The clause referred to reads as follows:

“That in time of war any officer serving with troops operating against an enemy who shall exercise, under assignment in orders issued by competent authority, a command above that pertaining to his grade shall be entitled to receive the pay and allowances appropriate to the command so exercised.”

I had occasion, at your request, to expound the meaning of this clause in an opinion rendered to you under date of June 17, 1898. I then stated that the clear purpose of the President and of Congress, as evidenced by this legislation and subsequent proceedings, was to form the volunteers, in connection with the regular troops, into an army of the United States for service in the war against Spain; that the object of the clause under consideration was undoubtedly to give the officers assigned to commands above those pertaining to their rank in the regular service just and proper pay commensurate with the rank in which they were actually serving in the war forces, instead of the smaller pay allowed to them by law according to their commissions in the regular service in time of peace. I further stated that

the clause in question was intended to apply to all instances where the troops of the United States are assembled into separate bodies, such as regiments, brigades, divisions, or corps, for the purpose of carrying on and bringing to a conclusion the war with Spain, and that if the operations of the troops are with the direct object of assisting in the military measures of the Government for subduing the forces of Spain they could, within the reasonable intendment of this act, be considered as operating against an enemy, although such operations might not be direct, but in the nature of necessary component steps, though remote, in one great military objective.

The question that now arises is whether the status of armistice prevailing between the United States and Spain by virtue of the protocol of agreement between the two Governments, signed at Washington, August 12, 1898, has rendered these views inapplicable, so that the conditions under which increased pay should be allowed have terminated.

By article 6 of said protocol it is agreed that upon the conclusion and signature of this protocol hostilities between the two countries shall be suspended, and notice to that effect shall be given as soon as possible by each Government to the commanders of its military and naval forces.

In my judgment the suspension of hostilities provided for by the protocol is not tantamount to a termination of the war, but creates only what you happily describe in your letter as an interval in war and supposes a return to it. The Volunteer Army of the United States has not been disbanded, but is still armed and in the field, ready for the resumption of hostilities provided the negotiation for a final and definite peace, which are now being conducted, shall eventually fail. The United States is in possession of various points of Spanish territory, holding and governing it by virtue of military law. No treaty of peace has been signed, and in the eye of the law a condition of war still continues, actual hostilities only being suspended.

I therefore advise you that in all instances where officers are exercising, under assignment in orders, a command above that pertaining to their grade, in connection with the

Army of the United States, either in Cuba, Puerto Rico, the Philippine Islands, or within the United States, if performing no other service of a domestic nature, but held merely in readiness to resume hostilities, if necessary, and cooperate with the forces in carrying out the purposes of the war, they are entitled to the increased pay and allowance provided for by the act in question.

Very respectfully,

JOHN W. GRIGGS,
Attorney-General.

The SECRETARY OF WAR.

CHINESE.

A Chinese person not connected with the diplomatic service is not entitled to admission to the United States unless an official, teacher, student, merchant, or traveler for curiosity or pleasure.

A trader not being expressly known to the law as among the exempt classes, and not being included therein as a merchant, is not entitled to admission into the United States.

The status of a valid wife and her relation to her husband fairly embracing her with him in the permitted classes, if she is not in fact a laborer, does not extend so far as to confer upon her immunity from the certificate requirement to which her husband is entitled because of his having acquired a domicile here.

The wife is a distinct Chinese individual, and since all Chinese persons of the privileged classes must produce upon their original entry the prescribed certificate, the wife of a merchant must in any case produce that certificate upon her original entry.

DEPARTMENT OF JUSTICE,
November 3, 1898.

SIR: I have the honor to acknowledge the receipt of your communication of October 31, in which you inform me that since the 1st of October, 1896, customs officers have been instructed, in accordance with Syn. Dec. 17445, to require the certificate prescribed by section 6 of the act of July 5, 1884, relating to the exclusion of Chinese, to be presented by all applicants for admission to this country, without reference to sex or age, and that under my opinion of July 15, last, such officers have been instructed that only such Chinese persons as are specifically enumerated, viz,

officials, teachers, merchants, or travelers for curiosity or pleasure, shall be allowed admission upon presentation of the prescribed certificate. You state that the wife of Lee Yuen, a Chinese merchant resident at Rochester, N. Y., for ten years or more, has applied for admission to this country, but has not produced a certificate from the Government of China, from which country she comes directly to the United States, and you refer to credible testimony submitted as to the meritorious standing of Lee Yuen as a merchant of the city named. On these facts you submit for my decision the question whether or not, under the circumstances, the woman should be allowed to join her husband.

In my opinion referred to, considering the right to admission of Chinese persons known as traders under a certain form of certificate, I reached the conclusion that a trader, not being expressly known to the laws as among the exempt classes, and not being properly included therein as a merchant, is not entitled to admission into the United States even upon a certificate framed in accordance with section 6 of the act of 1884. The broad result may be drawn from this opinion that no Chinese person not connected with the diplomatic service is entitled to admission into this country unless embraced in the classification marked out by the phrase "officials, teachers, students, merchants, or travelers for curiosity or pleasure." We now have to consider whether the wife of a Chinese merchant is properly to be excepted from this absolute exclusion.

In the case of *Tung Yeong* (19 Fed. Rep., 184), the court considered, under the treaty of 1880 and the act of 1882, the right of entry of certain Chinese children of tender years, and found there was no requirement of law which would necessitate the denial to the parent of the custody of his child and the sending of the latter back to the country from which he came. The treaty of 1880, by article 2, accorded to Chinese subjects when proceeding to the United States as teachers, students, merchants, or travelers, together with their body and household servants, all the rights, privileges, immunities, and exemptions which are accorded to the subjects and citizens of the most favored nation. Section 6 of the act of May 6, 1882, as amended by the act of 1884, re-

quired from "every Chinese person other than a laborer who may be entitled by said treaty [the treaty of 1880] or this act to come within the United States" a certificate of permission and identification from the Chinese Government or from the other foreign government of which at the time such Chinese person shall be a subject; and this amended section provided for the contents of such certificate **and made** the same the sole evidence permissible on the **part of an applicant for admission to establish a right of entry into the United States.**

In the case of *Ah Quan* (21 Fed. Rep., 182, 186) it was held that the wife or minor child of a man of the Chinese race other than a laborer entitled to come to the United States is a Chinese person entitled under the law to enter this country upon the production of the required certificate, but not otherwise, in view of the provisions of the amendatory act requiring a certificate, the court being satisfied that these provisions embraced every Chinese individual.

In the case of the *Chinese Wife* (21 Fed. Rep., 785), affecting the wife of a laborer coming to this country for the first time returning under the laws then in force, Justice Field held that although the status of the wife is not necessarily that of her husband, and she is therefore to be regarded as other than a laborer, she is, however, a distinct person and must furnish the certificate required, while Judge Sawyer thought that the status of the wife follows and **partakes of** that of the husband as one of his class, and that the wife was therefore to be excluded absolutely as a laborer.

In the case of *Chung Toy Ho et al.* (42 Fed. Rep., 398), Judge Deady held that the wife and children of a Chinese merchant, who was entitled under article 2 of the treaty of 1880 and section 6 of the act of 1884 to come within and dwell within the United States, are entitled to come into the country with him or after him as such wife and children without the certificate prescribed in said section 6, the court considering that the domicile of the wife and children is to be taken as that of the father, and concluded, therefore, that though they are not expressly mentioned in the treaty, the act of 1884 does not limit or restrict the privileges conceded by the treaty, but only adds a rule or measure of evidence

by which they may be conclusively established. The learned judge further considers that the father is entitled to the company of his wife and the care and custody of his children by natural right and ought not to be deprived of them unless the intention of Congress to the contrary is clear and unmistakable.

The cases of *Wo Tai Li* (48 Fed. Rep., 668) and *Li Foon* (80 Fed. Rep., 881) follow the earlier decisions exacting a certificate from all Chinese persons of the permitted classes, while the case of *United States v. Gue Lim* (83 Fed. Rep., 138) follows Judge Deady's decision in the case of *Chung Toy Ho*.

In *United States v. Lee Yee Sing* (85 Fed. Rep., 635) the court adheres to the opinion rendered in the case of *Mrs. Gue Lim*, but sustains the exclusion by the collector of customs of a minor child of a Chinese merchant domiciled in this country, on the ground that paragraph 6 of the act of August 18, 1894 (2 Supp. Rev. Stat., 253), makes the decision of the appropriate Government officer excluding an alien from admission into the United States final unless reversed on appeal to the Secretary of the Treasury.

In most of the foregoing cases it appears that the husband or father had duly acquired a commercial domicile in this country.

In the case of *Lau Ow Bew v. United States* (144 U. S., 47, 63) it was held that a Chinese merchant having a commercial domicile here may leave the country for temporary purposes and return without the production on his reentry of the certificate required by the act of 1884, and that the certificate is only required to be produced by Chinese persons of the exempted classes upon their original entry into the United States for travel, business, or to take up their residence.

The inquiry, then, in many cases, including the case before us, is this: Is the status of the wife, and her relation to her husband when he has become duly domiciled here and is not therefore required to produce a certificate upon his return to the country after a temporary absence, to be taken as extending such exemption to her, so that upon the original entry of the wife of such a Chinese merchant she would

not be required to produce a certificate, but merely to submit evidence as to her identity and valid relation to her husband sufficient to satisfy the collector of customs under the act of August 18, 1894?

Conceding that a fundamental natural right exists under the language of the treaties of 1880 and 1894, by which, in view of the relationship to the husband and father, a valid wife and legitimate minor children or children of tender years may be admitted to this country, I am clearly of opinion that this right in all cases must be established by the rule or measure of evidence laid down by section 6 of the act of 1884, namely, by the certificate therein required. I can perceive no valid distinction between the case of the wife of a Chinese merchant accompanying her husband to this country upon his original entry here and that of the wife of such a merchant already domiciled here and entitled to remain in this country, who subsequently follows her husband and seeks to join him here and for that purpose to enter the country for the first time. In both cases a certificate for the wife is requisite.

The status of a valid wife and her relation to her husband fairly embracing her with him in the permitted classes, if she is not in fact a laborer, does not extend so far as to confer upon her an immunity from the certificate requirement to which the husband is entitled because of his having acquired a domicile here. The wife is a distinct Chinese individual, and since all Chinese persons of the privileged classes must produce upon their original entry into this country the prescribed certificate (authorities cited *ante*; see also *Wan Shing v. United States*, 140 U. S., 424, 428), the wife of a merchant must in any case produce that certificate upon her original entry here.

I therefore answer your question by stating that the Chinese woman in this case, Mrs. Lee Yuen, should not be allowed to join her husband and remain in this country without the production of the proper certificate from the Government of China.

Very respectfully,

JOHN W. GRIGGS.

The SECRETARY OF THE TREASURY.

PUBLIC PRINTING—DEPARTMENT OF AGRICULTURE.

The direct object of section 89 of the act of January 12, 1895, was to limit the number of pages of the bulletins of the Department of Agriculture to 100 and the maximum size of the pages to octavo.

DEPARTMENT OF JUSTICE,

November 14, 1898.

SIR: I am in receipt of your letter of 7th instant, advising me that it is the desire of your Department to publish a bulletin of the Division of Forestry in 16 mo. form, to contain more than 100 pages, and inquiring whether, in view of the provisions of section 89 of the act providing for the public printing and binding and the distribution of public documents, approved January 12, 1895, it will be lawful to do so.

The proviso to the section mentioned, which you quote in your letter, is as follows:

“Provided, The Secretary of Agriculture may print such number of copies of the Monthly Crop Report, and of other reports and bulletins containing not to exceed one hundred octavo pages, as he shall deem requisite.”

The effect of this proviso is to limit all such bulletins and other publications to 100 pages, which shall not exceed the size known as octavo. If it is desired to use a smaller form it is not, in my judgment, permissible to print a bulletin containing more than 100 pages upon the ground that no more matter is contained therein than would be contained in a bulletin of 100 pages of octavo. The direct object of the legislation was to limit the number of pages to 100 and the maximum size of the pages to octavo. It might be contended with a good deal of force that the word “octavo” was used to define exactly the form in which these bulletins should be printed, but I do not go so far as to advise you that it has that effect.

I agree with the interpretation put upon this provision by the chief clerk of the Public Printer, which is cited in your letter.

Very respectfully,

JOHN W. GRIGGS.

The SECRETARY OF AGRICULTURE.

FOREST RESERVATIONS—STATUTORY CONSTRUCTION.

Congress has the right to place the control of the occupancy and use of forest reservations in the hands of the Secretary of the Interior for their preservation.

A criminal prosecution will lie to punish a person who grazes sheep in a forest reservation in violation of the regulations promulgated by the Secretary of the Interior pursuant to law.

Congress can not delegate its legislative power so as to authorize an administrative officer, by the adoption of regulations, to create an offense and prescribe its punishment.

DEPARTMENT OF JUSTICE,

November 17, 1898.

SIR: Section 5388 of the Revised Statutes, as amended by the act of June 4, 1888 (25 Stat., 166), provides as follows:

“Every person who unlawfully cuts, or aids or is employed in unlawfully cutting, or wantonly destroys or procures to be wantonly destroyed, any timber standing upon the land of the United States which, in pursuance of law, may be reserved or purchased for military or other purposes, or upon any Indian reservation, or lands belonging to or occupied by any tribe of Indians under authority of the United States, shall pay a fine of not more than five hundred dollars or be imprisoned not more than twelve months, or both, in the discretion of the court.”

The act of June 4, 1897, entitled “An act making appropriations for sundry civil expenses of the Government for the fiscal year ending June 30, 1898, and for other purposes,” provides (30 Stat., 35):

“The Secretary of the Interior shall make provisions for the protection against destruction by fire and depredations upon the public forests and forest reservations which may have been set aside or which may be hereafter set aside under the said act of March 3, 1891, and which may be continued; and he may make such rules and regulations and establish such service as will insure the objects of such reservations, namely, to regulate their occupancy and use and to preserve the forests thereon from destruction; and any violation of the provisions of this act or such rules and regulations shall be punished as is provided for in the act of June 4, 1888, amending section 5388 of the Revised Statutes of the United States.”

Under the authority thus conferred the Secretary of the Interior, on June 30, 1897, promulgated certain rules and regulations for the purpose of regulating the occupancy and use of the forest reservations and to preserve the forests thereon from destruction, among which was the following:

"13. The pasturing of live stock on the public lands in forest reservations will not be interfered with so long as it appears that injury is not being done to the forest growth and the rights of others are not thereby jeopardized. The pasturing of sheep is, however, prohibited in all forest reservations, except those in the States of Oregon and Washington, for the reason that sheep grazing has been found injurious to the forest cover and therefore of serious consequence in regions where the rainfall is limited. The exception in favor of the States of Oregon and Washington is made because the continuous moisture and abundant rainfall of the Cascade and Pacific coast ranges make rapid renewal of herbage and undergrowth possible, etc."

In view of the foregoing you request my opinion whether a criminal prosecution will lie to punish a person who grazes sheep in a forest reservation in violation of the regulation quoted.

I recognize the existence of the salutary rule that Congress can not delegate its legislative power so as to authorize an administrative officer, by the adoption of regulations, to create an offense and prescribe its punishment. But here the statute proclaims the punishment for an offense which, in general terms, is defined by law, the regulation dealing only with a matter of detail and administration, necessary to carry into effect the object of the law. The protection of the public forests is intrusted to the Secretary of the Interior. Section 5388 makes it an offense, punishable by fine and imprisonment, for any person wantonly to destroy any timber on a public reservation. In furtherance of this policy the act of June 4, 1897, directs the Secretary to make provision for the protection of the forests and authorizes him to regulate the use and occupancy of the forest reservations and to preserve the forests thereon from destruction, making for such purpose proper rules and regulations. Any violation of such rules and regulations is by

the statute made an offense, punishable as provided in section 5388. By this law the control of the occupancy and use of these reservations is handed over to the Secretary for the purpose of preserving the forests thereon, and any occupancy or use in violation of the rules and regulations adopted by him is made punishable criminally. It seems to me Congress has a right to do this. Suppose Congress had provided that the occupation or use of a forest reservation by any person without permission of the Secretary should be a misdemeanor. Would not this be a valid exercise of legislative power? The present statute does no more. The regulation is reasonable and necessary. It restrains no one in the enjoyment of any natural or legal right. To use the language of Mr. Chief Justice Fuller in *In re Kollock* (165 U. S., 526, 533):

“The regulation was in execution of, or supplementary to, but not in conflict with, the law itself, and was specifically authorized thereby in effectuation of the legislation which created the offense.”

Your question, therefore, is answered in the affirmative.

Very respectfully,

JOHN K. RICHARDS,
Solicitor-General.

Approved:

JOHN W. GRIGGS.

The SECRETARY OF THE INTERIOR.

COPYRIGHTS—CUBA, PUERTO RICO, THE PHILIPPINE ISLANDS.

The inhabitants of Hawaii, in the absence of affirmative legislation by Congress to that effect, are not entitled to the benefits of the United States copyright laws.

When Cuba, Puerto Rico, and the Philippine Islands have been duly ceded to the United States their respective inhabitants will not be entitled to the benefits of the copyright laws unless the treaty by its terms confers such right or Congress shall extend such laws to the inhabitants of those countries.

Hostilities between nations suspend intercourse and deprive citizens of the hostile nations of rights of an international character previously enjoyed.

So long as a state of war exists between Spain and the United States Spanish subjects have no right to the privilege of copyright conferred upon Spanish citizens by proclamation prior to the declaration of war.

DEPARTMENT OF JUSTICE,

December 2, 1898.

SIR: I have the honor to acknowledge the receipt of your communication of November 28, inclosing one from the Librarian of Congress, who desires to know whether the inhabitants of Hawaii, Cuba, Puerto Rico, and Manila are entitled to register publications for copyright, and if so, whether as foreigners or as citizens or subjects of the United States.

In answer, I have the honor to advise you as follows:

It appears that the subjects of Hawaii had not, prior to the passage of the resolution of annexation of July 7, 1898, become vested by proclamation with the privilege of copyright in the United States. I have heretofore held, in an opinion, a copy of which is inclosed herewith, that certain laws of the United States relative to tonnage dues upon vessels from foreign ports still applied to the ports of Hawaii, and had not been abrogated by the terms or effect of the resolution of annexation. For the reasons given in that opinion, I think that the inhabitants of Hawaii are not at present, in the absence of affirmative legislation by Congress to that effect, entitled to the benefits of our copyright laws.

Puerto Rico, Cuba, and Manila have not, as yet, been formally ceded to the United States. So far as they are subject to the control and government of this country, they are ruled under the principle of belligerent right. They have not become entitled to the rights and privileges of citizens of the United States. In my opinion, when they shall have been directly ceded by treaty to the United States, and such treaty duly ratified by the Senate, their respective inhabitants will not be entitled to the benefit of the copyright laws unless the treaty by its terms confers such right, or Congress shall afterwards extend such laws to the inhabitants of those countries.

If any inhabitants of Puerto Rico, Cuba, or the Philippine Islands claim the privilege of copyright as Spanish subjects, that right at present is subject to the well-known rule that

hostilities between two nations suspend intercourse and deprive citizens of the hostile nations of rights of an international character previously enjoyed. I am of opinion that so long as a state of war exists between Spain and the United States Spanish subjects have no right to the privileges of copyright conferred upon Spanish citizens by proclamation prior to the declaration of war.

When a treaty of peace shall have been finally concluded their rights will be determined either by the provisions of the treaty, or, if the treaty be silent, it will be competent for the United States, through its executive officers, to resume the exercise of such rights and privileges as previously existed and have not been definitely declared terminated. So that if the treaty of peace be silent with reference to copyright, it would, in my opinion, be entirely proper for the Librarian of Congress to admit Spanish subjects after the conclusion and ratification of the treaty to the same copyright privileges that they enjoyed prior to the declaration of war.

Very respectfully,

JOHN W. GRIGGS.

The PRESIDENT.

STAMP TAX—CHARTER PARTIES.

The paragraph of Schedule A under the head of "Charter Party" in the war-revenue law, applies to all vessels registered under the provisions of Title XLVIII, Revised Statutes, and does not apply to vessels enrolled or licensed under Title L.

The charter parties of registered vessels sailing between the Atlantic and Pacific coasts of the United States in the coasting trade are to be stamped.

DEPARTMENT OF JUSTICE,

December 2, 1898.

SIR: I have the honor to acknowledge yours of the 25th of November ultimo, requesting a further opinion as to the tax upon charter-party contracts and agreements under Schedule A of the war-revenue act of June 13, 1898.

You state in your letter that the Treasury Department considers it doubtful whether the law was intended to exempt from tax charter parties of registered vessels sailing between

the Atlantic and Pacific coasts in the United States in the coasting trade. This doubt seems to have arisen from the fact that, in an opinion rendered to you August 2, 1898, by me, I copied an advisory opinion which I had previously given to the Commissioner of Internal Revenue upon this question, in which I said that "Under Title XLVIII registered tonnage comprises the tonnage of vessels of the United States employed in foreign trade or the whale fisheries;" and for this reason it seems to have been assumed that the stamp tax upon charter-party contracts and agreements was to be confined to this class of vessels. But upon the reading of the whole opinion of August 2, 1898, you will observe that the distinction drawn is between registered vessels, to which the provision of the war-revenue act is held to apply, and enrolled and licensed vessels, to which it is held not to apply, for I say in my previous opinion that—

"When the term 'registered tonnage' was used in the act, it could mean, in my opinion, nothing more than to apply the law to such vessels as are required by law to be registered. It is a technical term and applied to a particular class of vessels known as registered vessels in distinction from enrolled vessels and licensed vessels."

However, to be fully understood, I again reiterate that my view of the proper construction of the act is that the paragraph of Schedule A, under the head of "Charter party," applies to all vessels registered under the provisions of Title XLVIII of the Revised Statutes, and does not apply to vessels enrolled or licensed under Title L of the said statutes.

Respectfully,

JAS. E. BOYD,
Assistant Attorney-General.

Approved.

JOHN W. GRIGGS.

The SECRETARY OF THE TREASURY.

STAMP TAX—PATENT MEDICINES.

Uncompounded medicinal drugs or chemicals, no matter how put up, or what is claimed for them, are exempt from tax by section 20 of the act of June 13, 1898.

The class of medicines taxable under the provisions of the law are such as go to the consumer in the unbroken packages in which they are put up by the proprietor, manufacturer, or compounder, with name and disease and the directions for use without the intervention of a prescription of a physician or pharmacist.

The act does not apply to such medicinal articles or preparations as are put up under pharmaceutical or classifying names for use of physicians in their practice, or pharmacists or druggists in their trade.

By the last clause of section 20 of the act of June 13, 1898, Congress intended to levy tax upon proprietary medicinal articles, or such as assume the character before the public of proprietary, patent, or trade-mark articles, and such medicinal articles as go from the hands of the proprietor, compounder, or manufacturer so put up in packages as to comport with the manner and style of patent, trade-mark, or proprietary medicines in general.

The question as to what is an uncompounded medicinal drug, or an uncompounded chemical, being one of fact and not of law, is to be determined according to the technical meaning that has become attached to it.

"To advertise" means to give publicity through the medium of newspapers, handbills, circulars, or some similar way, so as to call particular attention to a subject-matter in order that people may identify it from the description given in the advertisement.

DEPARTMENT OF JUSTICE,

December 22, 1898.

SIR: I have the honor to acknowledge receipt of your two letters, one of the 11th and the other of the 21st of October, 1898, both requesting opinions as to the construction of section 20 of the act of June 13, 1898, known as the war-revenue act.

In your letter of the 21st of October two questions are propounded. First, "What, under the law, is an uncompounded medicinal drug?" Second, "What, under the law, is an uncompounded medicinal chemical?"

The inquiry as to what is an uncompounded medicinal drug or an uncompounded chemical is not, in my opinion, a question of law, but a question of fact, to be determined according to the general definition of the word "uncompounded," or according to such technical meaning as has

become attached to it as a pharmaceutical or medical term. It is clear, however, that no tax is imposed by the act above mentioned on any uncompounded medicinal drug or chemical, no matter how put up or what is claimed for it, the same being excepted from the operations of the act by the first clause of the proviso in section 20, which is in these words: "That no stamp tax shall be imposed upon any uncompounded medicinal drug or chemical."

The question, therefore, left for my consideration is the request contained in your letter of the 11th of October, for an opinion as to the construction of the last clause of section 20 of the said act. This clause reads as follows:

"The stamp taxes provided for in Schedule B of this act shall apply to all medicinal articles compounded by any formula, published or unpublished, which are put up in style or manner similar to that of patent, trade-mark or proprietary medicine in general, or which are advertised on the package, or otherwise, as remedies or specifics for any ailment, or as having any special claim to merit, or to any peculiar advantage in mode of preparation, quality, use, or effect."

If we digest this provision of the law we find that the subjects of taxation to be included within it comprise:

First. Medicinal articles compounded by any formula, published or unpublished, which are put up in style or manner similar to that of patent, trade-mark, or proprietary medicines in general.

Second. Medicinal articles compounded by any formula, published or unpublished, which are advertised on the package, or otherwise, as remedies or specifics for any ailment, or as having any special claim to merit, or to any peculiar advantage in mode of preparation, quality, use, or effect.

The manner and style of putting up what are known as patent, trade-mark, or proprietary medicines in general is so familiar to the public that it is readily understood as to what articles under the first of the above divisions the stamp tax applies, the general style of putting up these medicinal articles being in a bottle, phial, box, or other inclosure, accompanied by the name of the preparation, the name of

the proprietor, owner, or manufacturer, together with the name of the disease or diseases for which the medicine is claimed to be a remedy or specific, with directions as to use, etc. I may better illustrate what articles are comprehended under this first division by calling attention to some of the exhibits which have been filed with me for consideration in connection with this question. For instance, Chamberlain's Cough Remedy: This medicine is put up in a bottle which will probably hold two ounces. Blown in the bottle on the side is "Chamberlain's Cough Remedy, Des Moines, Ia., U. S. A." On another side of the bottle is pasted a label, upon which is printed:

"CHAMBERLAIN'S COUGH REMEDY.

"For the cure of Coughs, Colds, Croup, Whooping Cough, Influenza, Hoarseness, Bronchitis, and Sore Throat.

"It is also a certain preventive for Croup if used as directed.

"DOSE: The average dose for a grown person, *for a cold*, is one teaspoonful, for a child a half teaspoonful. If that is ineffectual take more. If it nauseates take less.

"For Croup give one or two teaspoonfuls, according to age of the child, every ten minutes until vomiting is produced.

"Read the directions before using.

"Manufactured by CHAMBERLAIN MEDICINE CO., Des Moines, Ia."

Around the bottle is a printed circular as to the special merit claimed for the preparation, and also as to its use and effect. The bottle with this printed circular around it is inclosed in a paper case or wrapper, securely pasted, and upon the outside of this case or wrapper is also printed the name of the medicine, the names of the diseases which it is claimed to cure, the name and location of the manufacturer, and the price of the bottle or package, which is 25 cents.

Now, that is a proprietary medicine, put up in the style and manner of patent, trade-mark, or proprietary medicines in general.

A great number of other proprietary preparations, such as Simmons' Liver Regulator, Paine's Celery Compound, Warner's Safe Liver and Kidney Cure, Crane's Syrup of

Tar and Wild Cherry, all of which are put up in manner and style similar to the above-described remedy, and advertised as remedies and specifics, have been called to my attention, as exhibits, in passing upon the question which your letter presents. These medicinal articles, with others put up in the same manner and style, and offered to the public, are readily seen to be included within the provisions of the act.

The only difficulty seems to be to determine the scope of the language under the second heading, which I have given before, and to say whether it increases the subjects of taxation referred to under the first heading; and if so, how far; or is intended more particularly to describe such subjects in order to prevent evasion of the tax. I think a proper construction is to hold the latter to be the intent of the law.

Under the second heading, articles to be subject to the tax must not only be compounded by some formula, but must be remedies or specifics for some ailment, or have special claim to merit, or to peculiar advantage in mode of preparation, quality, use, or effect. If the law makers had stopped here they would perhaps have left a broader field for the consideration of this subject; but, in addition to the above, the requirement of the law is that these medicinal articles must be put up in packages, and not only put up in packages, but there must be an advertisement on each package as to the diseases for which the medicine is a remedy or specific, or as to the special merits, etc., which are claimed for it; or, if the advertisement is not on the package itself, there must be an advertisement otherwise made, by which the public is referred particularly to the medicine in the package or class of packages. In other words, the advertisement either goes with the package itself into the hands of the consumer, so as to indicate to him the character of the medicine, the disease for which it is prescribed, and the special merit, etc., which is claimed for it, or the advertisement, made in newspapers, handbills, circulars, or otherwise, apart from the packages, must point the reader to this particular medicine.

Mr. Bouvier defines "advertisement" to mean "a notice published in handbills or a newspaper." Hence, to advertise would mean to give publicity through the medium of

newspapers, handbills, circulars, or some similar way, so as to call particular attention to a subject-matter, in order that people may identify it from the description given in the advertisement.

This line of reasoning, which, I think, is sustained by the wording of the act, leads to the conclusion that it was the purpose of the Congress to levy the tax under the provision of the law referred to upon proprietary medicinal articles, or such as assume the character before the public of proprietary, patent, or trade-mark articles, and such medicinal articles as go from the hands of the proprietor, compounder, or manufacturer so put up in packages as to comport with the manner and style of patent, trade-mark, or proprietary medicines in general, or where medicinal articles, though not put up in the usual style of patent, trade-mark, or proprietary articles in general, still have the characteristics of patent, trade-mark, or proprietary articles to the extent that they are advertised on the packages or otherwise as specifics or remedies for certain ailments, or have claims to special merit or advantage in mode of preparation, quality, use, or effect. I am borne out in this conclusion by the fact that when we turn to Schedule B, where the manner of paying the tax upon these articles is provided, we find that in the first clause of Schedule B the subjects of taxation are described in these words: "Medicinal *proprietary* articles and preparations." This description is not general so as to include medicinal articles and preparations which may bear a technical or pharmaceutical name, indicative of the disease for which they are used, in order to classify them and distinguish them from other medicines, but is confined to such as are "proprietary." Then, when we come to consider the manner in which the tax is estimated, we see that the Congress still had in mind packages, packets, boxes, bottles, pots, etc., each of which must have a retail price or value attached to it so as to determine the amount of the stamp to be placed upon it.

Now, to draw the distinction more clearly between medicinal articles or preparations which I hold to be taxable under the provisions of the law and those that are not, I will call attention to a class of preparations or medicines, sam-

ples of which have been filed with me for examination, and which, in my opinion, are not taxable. They are articles which are put up in bottles, vials, or other packages more particularly for the use of physicians and pharmacists. They are such articles as antistreptococcic serum, antitetonic serum, antidiphtheritic serum, and many others of like character. These articles are not put up in the manner or style of patent, trade-mark, or proprietary medicines in general, nor are they advertised to the public upon the package or otherwise as specifics or remedies for particular diseases, or as claiming special merit, etc. The names upon the bottles, phials, or other packages containing these preparations are simply medical or pharmaceutical designations used to indicate the class of medicines to which they belong, and are for the guidance of physicians and pharmacists, and under their directions to be used by the consumer. I also include under this head such medicinal articles as Pil. Migraine Comp., Pil. Neuralgic, compressed tablets antimalarial, and medicines of similar classes put up in quantities in bottles or other packages, for the use of physicians, druggists, and pharmacists, through whom they are dealt out to consumers as prepared prescriptions. These articles have the technical medical names upon the bottle or other package, and also the formula by which they are prepared. There is no exclusive proprietorship or right of manufacture claimed in them, but any pharmacist or manufacturing druggist has the right to make them after the formula given, and there is no retail price or value stated on the bottle or other package containing them.

It might make the distinction still more plain to say that *the class* of medicines which in my opinion are taxable under *the provisions* of the law are such as I have described above, *which* go to the consumer in the unbroken package in which *they* are put up by the proprietor, manufacturer, or compounder, with name, disease, and directions for use without *the intervention* of a prescription of a physician or pharmacist; *while*, on the other hand, the provisions of the act do not *reach* such medicinal articles or preparations as are put up *under* pharmaceutical or classifying names for the use of

physicians in their practice or of pharmacists or druggists in their trade.

Calomel is a medicinal article or remedy compounded, I believe, by a formula from mercury, sulphuric acid, chloride of sodium, and distilled water. It is a well-known remedy for certain diseases, and special merit is claimed for it in the treatment of diseases like bilious fevers, hepatitis, jaundice, bilious and painters' colic, and other affections attended with congestion of the portal system or torpidity of the hepatic function. This medicinal article is put up in quantities by the manufacturers after the prescribed formula, and is sold to physicians, pharmacists, and druggists, and the latter in turn prescribe it for the afflicted and deal it out in quantities to suit the emergency. Now, calomel is not taxable under the provisions of the war-revenue act for the reason that it does not come within the description of articles declared to be subject to tax under the provisions of the act. In the first place, it is not put up in the manner and style of patent, trade-mark, or proprietary medicines in general; and, in the second place, it is not advertised on the package in which it is put up as contemplated by the act; and even if the manufacturer or compounder were to put on the inclosure containing the calomel the additional words "antibilious" or "antihepatitis" it would, in my opinion, only have the effect to designate more particularly the class of medicines to which it belongs, and not to advertise it as a specific or remedy for a particular disease. I have given this illustration and used the name of a well-known medicinal article to make the distinction which I have attempted to draw the more easily understood.

Respectfully,

JAS. E. BOYD,
Assistant Attorney-General.

Approved.

JOHN W. GRIGGS.
The SECRETARY OF THE TREASURY.

STAMP TAX—FERMENTED LIQUORS.

Section 3339, Revised Statutes, as amended by the war-revenue law, still contains the express provision that the tax on fermented liquors must be paid by the brewer.

Retail liquor dealers are not required to pay the additional tax of \$1 imposed by the war-revenue law on fermented liquors purchased by them prior to June 14, 1898, and held in stock by them on that day.

The place of business of a retail dealer in any commodity can not properly be termed a warehouse.

A warehouse is a place for storing goods, not for selling them at retail.

DEPARTMENT OF JUSTICE,

December 27, 1898.

SIR: Prior to the passage of the so-called "war-revenue act" of June 13, 1898 (30 Stat., 448), which took effect on June 14, 1898, the day next succeeding its passage (sec. 51), the tax upon fermented liquors was fixed at \$1 for every barrel, and was required to be paid by the brewer, the statute (sec. 3339 Revised Statutes) reading:

"There shall be paid on all beer, lager beer, ale, porter, and other similar fermented liquors brewed or manufactured and sold, or removed for consumption or sale, within the United States, by whatever name such liquors may be called, a tax of one dollar for every barrel containing not more than thirty-one gallons; and at a like rate for any other quantity or for any fractional part of a barrel.

"In estimating and computing such tax the fractional parts of a barrel shall be, etc. (describing them). The said tax shall be paid by the owner, agent, or superintendent of the brewery or premises in which such fermented liquors are made, and in the manner and at the time hereinafter specified."

The war-revenue act of June 13, 1898, provided in its first section as follows:

"That there shall be paid, in lieu of the tax of one dollar now imposed by law, a tax of two dollars on all beer, lager beer, ale, porter, and other similar fermented liquors brewed or manufactured and sold, or stored in warehouse, or removed for consumption or sale, within the United States, by whatever name such liquors may be called, for every barrel containing not more than thirty-one gallons; and at a like rate

for any other quantity or for the fractional parts of a barrel authorized and defined by law. And section thirty-three hundred and thirty-nine of the Revised Statutes is hereby amended accordingly: *Provided*, That a discount of seven and one-half per centum shall be allowed upon all sales by collectors to brewers of the stamps provided for the payment of said tax: *Provided further*, That the additional tax imposed in this section on all fermented liquors stored in warehouse to which a stamp had been affixed shall be assessed and collected in the manner now provided by law for the collection of taxes not paid by stamps."

In view of the changes thus made in the law taxing the manufacture and sale of fermented liquors, and more especially in view of the provision requiring the tax to be paid on all fermented liquors "brewed or manufactured and sold, or stored in warehouse, or removed for consumption or sale," you submit the question, Must retail liquor dealers pay the additional tax of \$1 on fermented liquors purchased by them prior to June 14, 1898, and held in stock by them on that date?

The first section of the war-revenue act, after increasing the tax from \$1 to \$2 per barrel, and after making it applicable to all fermented liquors manufactured and stored in warehouse, as well as to fermented liquors manufactured and sold or removed for consumption or sale, provides that "section thirty-three hundred and thirty-nine of the Revised Statutes is hereby amended accordingly," and then attaches the two provisos, the first allowing a discount of $7\frac{1}{2}$ per centum and the second providing for the collection of the additional tax on liquors stored in warehouse by assessment. This section therefore amends and supplements section 3339, Revised Statutes, which, as thus modified, would read as follows:

"SEC. 3339. There shall be paid on all beer, lager beer, ale, porter, and other similar fermented liquors, brewed or manufactured and sold or stored in warehouse, or removed for consumption or sale, within the United States, by whatever name such liquors may be called, a tax of two dollars for every barrel containing not more than thirty-one gallons;

and at a like rate for any other quantity or for any fractional part of a barrel.

“ In estimating and computing such tax the fractional part of a barrel shall be, etc. [describing them]. And the said tax shall be paid by the owner, agent, or superintendent of the brewery or premises in which fermented liquors are made, and in the manner and at the time hereinafter specified: *Provided, That a discount of seven and one-half per centum shall be allowed upon all sales by collectors to brewers of the stamps provided for the payment of said tax: Provided further, That the additional tax imposed in this section on all fermented liquors stored in warehouse to which a stamp had been affixed shall be assessed and collected in the manner now provided by law for the collection of taxes not paid by stamps.*”

Section 3339 is one of a number of sections (3335 to 3354, inclusive) which compose chapter 5 of title 35 of the Revised Statutes and regulate the levy and collection of the tax on fermented liquors. These sections are all carefully framed for the purpose of carrying into execution a tax payable by the brewer. Thus, section 3339 requires every brewer to give notice to the collector of his intention to enter upon the brewing business. Section 3336 provides for the bond which the brewer on giving such notice must execute to secure the payment of the tax. Section 3337 prescribes the books the brewer must keep and the reports he must make to the collector of the fermented liquors made and sold by him. Section 3338 requires a monthly verification on oath of the book entries. Section 3339, quoted above, imposes the tax and expressly provides that it shall be paid by the brewer. Section 3340 fixes the penalty for the brewer who evades or attempts to evade the payment of the tax. Section 3341 regulates the supply and sale of the revenue stamps denoting the tax. Section 3342 prescribes how these stamps shall be affixed and canceled. Section 3343 provides a penalty for selling and removing or buying fermented liquors in packages without the proper stamp. Section 3344 fixes the penalty for drawing fermented liquors from a package without the stamp or without destroying the stamp thereon. Section 3345 provides that any brewer, under a permit, may remove fermented liquors from his

brewery to "a depot, warehouse, or other place used exclusively for storage or sale in the bulk," without affixing the stamps. This is what is known technically as a brewer's warehouse. The succeeding sections provide a penalty for counterfeiting stamps (section 3346), for the disposition of damaged liquor (section 3347), for the sale by brewers at retail (section 3348), for the branding by brewers of packages (section 3349), for a permit for a brewer to change his place of business in case of accident (section 3350), for the sale among brewers of unfermented worts (section 3351), for the forfeiture of unstamped packages of liquor wherever found outside of breweries or warehouses (section 3352), for the punishment of those who unlawfully remove or deface stamps affixed to packages (section 3353), and for the withdrawal from a brewery or warehouse to a bottling house of fermented liquor (section 3354).

In framing these sections Congress steadily kept in mind that the tax is a tax on the manufacture and sale of fermented liquors, payable by the person who makes the liquor, the brewer. In view of this fact, and the wording of section 3339, as amended by the war-revenue act, I am disposed to think that the tax is not intended to apply to a retail dealer. The amendment in section 3339 made by the first section of the war-revenue act changed the word "one" before "dollar" to "two," inserted the words "or stored in warehouse" after "brewed or manufactured and sold," and added the provisos, without otherwise altering the reading of the section as it stood. It therefore still contains the express provision that the tax shall be paid by the brewer. While it now provides that the tax shall be paid on fermented liquors brewed or manufactured and stored in warehouse, this clearly means fermented liquors brewed or manufactured and stored in warehouse by the person liable for the tax, namely, the brewer. Congress evidently had in mind that outside of the technical bonded brewery warehouse, where fermented liquors are stored without affixing the stamps, the great brewing establishments have agencies in the cities throughout the country, where their liquors are stored and from which they are distributed to the retail trade. If the increase in the tax had not been made applicable to liquors

thus stored in warehouse, the brewers, in anticipation of the increase, could have removed immense quantities of liquors from their breweries and bonded warehouses by paying the old tax and held them in storage at their agencies, awaiting the increase in price which the imposition of the additional tax might bring. To prevent this, Congress made the increase applicable to liquors stored in warehouse, but it was liquor stored in warehouse by the brewer.

Another thing. The principal fermented liquor sold in this country is beer. It is a well-known fact that the stock of beer held by a retail dealer is, comparatively speaking, insignificant. Each day he is supplied by the brewer or his agent. The few barrels which a retail dealer keeps as his stock in trade could not properly, in my opinion, be regarded as beer "stored in warehouse." The place of business of a retail dealer in any commodity can not properly be termed a warehouse. Nor can the stock in trade which is at hand and is constantly being drawn on to supply his customers be rightfully regarded as "stored in warehouse." A warehouse is a place for storing goods, not for selling them at retail. The distinction is obvious.

Your question is therefore answered in the negative.

Very respectfully,

JOHN K. RICHARDS,
Acting Attorney-General.

The SECRETARY OF THE TREASURY.

STAMP TAX—WAREHOUSE RECEIPTS.

All receipts given for goods, merchandise, or property held on storage in a warehouse must be stamped.

A receipt is a writing acknowledging the taking of money or goods, and may or may not be negotiable as the party by whom it is given may choose to make it or local law may provide.

A warehouse receipt is nothing more nor less than the written statement of the warehouseman that certain goods, merchandise, or property are deposited in his warehouse and held on storage for some particular person or persons.

DEPARTMENT OF JUSTICE,
December 29, 1898.

SIR: I have the honor to acknowledge receipt of yours of the 29th of October, 1898, inclosing copy of letter from the

Commissioner of Internal Revenue, in which you ask my opinion as to the proper construction to be put upon the clause of Schedule A of the war-revenue act relating to stamps upon warehouse receipts. The clause referred to is as follows:

“Warehouse receipt for any goods, merchandise, or property of any kind held on storage in any public or private warehouse or yard, except receipts for agricultural products deposited by the actual grower thereof in the regular course of trade for sale, twenty-five cents.”

Omitting the portion of this statute excepting from its operation receipts for agricultural products deposited by the actual grower thereof in the regular course of trade for sale, it is a reproduction of a like provision in the revenue act of July 1, 1862. (See 12 Stat. L., ch. 119, Schedule B, p. 483.)

The construction placed upon this clause of the statute of 1862 is found in Boutwell's Manual of the United States Tax System, page 340, ruling No. 241, and it is held that—

“All receipts for grain or other property of any kind on storage in any public or private warehouse or yard are ‘warehouse receipts’ within the meaning of the excise law, and are each subject to a stamp duty of twenty-five cents, without regard to the quantity specified or the time for which the property is stored.”

I concur in this construction of the former law, and, the language of the statute now under consideration being the same as that contained in the former law, I adopt it as the proper interpretation of the provision of the act of 1898 above quoted.

The contention made in the brief filed by the representative of the warehousemen that in order to be taxable a receipt given for goods, merchandise, or property held on storage in a warehouse must be a negotiable paper is in my opinion untenable. A receipt is a writing acknowledging the taking of money or goods, and may or may not be negotiable as the party by whom it is given may choose to make it or local laws may provide; but, whatever its character in this respect, it is still a receipt, and a receipt given for goods, merchandise, or property held on storage in a warehouse is a warehouse receipt. A warehouse receipt is nothing more

nor less than the written statement of the warehouseman that certain goods, merchandise, or property are deposited in his warehouse and held on storage for some particular person or persons. It is the written evidence of the storage of the property. This is the paper or instrument which, in my opinion, it is the intention of the law to tax, and I think such intention is plainly and unequivocally expressed in the language of the law.

I therefore advise you that all receipts given for goods, merchandise, or property held on storage in a warehouse require the stamp provided for by the clause of the war-revenue act above cited.

Respectfully,

JAS. E. BOYD,
Assistant Attorney-General.

Approved.

JOHN W. GRIGGS.

The SECRETARY OF THE TREASURY.

DUTIES—LEAD ORE.

In case the refined metal set aside as the product of imported lead ore is not reexported within six months from the date of the receipt of the ore the regular duties must be paid on the imported ore.

DEPARTMENT OF JUSTICE,
December 29, 1898.

SIR: Section 29 of the tariff act of July 24, 1897 (30 Stat., 151), reads as follows (p. 210):

“SEC. 29. That the works of manufacturers engaged in smelting or refining metals, or both smelting and refining, in the United States may be designated as bonded warehouses under such regulations as the Secretary of the Treasury may prescribe: *Provided*, That such manufacturers shall first give satisfactory bonds to the Secretary of the Treasury. Ores or metals in any crude form requiring smelting or refining to make them readily available in the arts, imported into the United States to be smelted or refined and intended to be exported in a refined but unmanufactured state, shall, under such rules as the Secretary of the Treasury may pre-

scribe, and under the direction of the proper officer, be removed in original packages or in bulk from the vessel or other vehicle on which they have been imported, or from the bonded warehouse in which the same may be, into the bonded warehouse in which such smelting or refining, or both, may be carried on, for the purpose of being smelted or refined, or both, without payment of duties thereon, and may there be smelted or refined, together with other metals of home or foreign production: *Provided*, That each day a quantity of refined metal equal to ninety per centum of the amount of imported metal smelted or refined that day shall be set aside, and such metal so set aside shall not be taken from said works except for transportation to another bonded warehouse or for exportation, under the direction of the proper officer having charge thereof, as aforesaid, whose certificate, describing the articles by their marks or otherwise, the quantity, the date of importation, and the name of vessel or other vehicle by which it was imported, with such additional particulars as may from time to time be required, shall be received by the collector of customs as sufficient evidence of the exportation of the metal, or it may be removed under such regulations as the Secretary of the Treasury may prescribe, upon entry and payment of duties, for domestic consumption, and the exportation of the ninety per centum of metals hereinbefore provided for shall entitle the ores and metals imported under the provisions of this section to admission without payment of the duties thereon: *Provided further*, That in respect to lead ores imported under the provisions of this section the refined metal set aside shall either be reexported or the regular duties paid thereon within six months from the date of the receipt of the ore. All labor performed and services rendered under these regulations shall be under the supervision of an officer of the customs, to be appointed by the Secretary of the Treasury, and at the expense of the manufacturer."

After directing my attention to the last proviso of this section, you submit the question whether, in case the refined metal set aside as the product of imported lead ore is not reexported within six months from the date of the receipt

of the ore, the regular duties must be paid on the imported ore or the refined metal produced therefrom.

The proviso reads:

"Provided further, That in respect to lead ores imported under the provisions of this section the refined metal set aside shall either be reexported or the regular duties paid thereon within six months from the date of the receipt of the ore."

The doubt as to the proper construction of the proviso arises from the position of the word "thereon." This word follows the words "refined metal." Does it refer to them or to the ore which is the subject of the proviso? This must be determined by a reading of the entire section in the light of the act of which it is a part.

Section 29 provides, primarily, a method for smelting imported ores in bonded warehouses for exportation without the payment of duties. Incidentally, there is provision for the removal of the refined metal for domestic consumption, upon entry and payment of duties; the primary object being the smelting of the imported ores in bond, the ascertainment of the refined product, and its exportation without the payment of duties. A method is provided for determining from day to day the actual product of the imported ores smelted. This is done by making an allowance of 10 per cent for wastage in the refining process, and requiring each day a quantity of refined metal equal to 90 per cent of the amount of imported metal smelted or refined that day to be set aside as the equivalent, in refining form, of the imported ore. The exportation of this refined metal cancels the warehouse bond and exempts from duties the imported ores out of which it is made; but if it is removed from the bonded smelter for domestic consumption there must be a proper entry and the payment of the regular duties.

Of course, when the refined metal is removed from the bonded smelter for domestic consumption there is a departure from the primary purpose of the section, and the product of the bonded smelter, instead of being exported, enters at once into competition in the home market with the product of the nonbonded smelter. The nonbonded smelter, if it uses

imported ore, whether alone or along with domestic ore, has to pay a duty on the full amount of the imported ore, no allowance being made for estimated wastage in the subsequent process of refining. In other words, the lead produced in a nonbonded smelter bears the total duty paid on the lead contents of the imported ore, as ascertained by assay on importation, without any abatement on account of loss incurred in the smelting.

The subject of the proviso is "lead ores imported under the provisions of this act." It is with respect to such ores the special provision is made. Six months from the receipt of such ore the refined metal set aside must be reexported or the regular duties paid. On what are "the regular duties" to be paid; upon the imported ore or the refined metal produced therefrom? Obviously, upon the former. Within six months from its receipt it must be smelted and the refined metal exported or the regular duties on the ore paid. On what could "the regular duties" be paid except upon the imported ore? It alone was the dutiable article, the thing actually imported, the thing on which "the regular duties" would have been paid had it not gone into the smelter to be refined for export.

The view that the duty must be paid on the imported ore is supported by the concluding phrase of the proviso, "within six months from the date of the receipt of the ore." The duties are to be paid not within six months from the setting aside of the refined metal, but within six months from the receipt of the ore. The bonded smelter was created to refine ore for exportation. Ore imported for this purpose goes into the smelter free of duty. It escapes the regular duties for a purpose, and in the case of lead ore this purpose must be carried out within six months or the exemption ceases, the regular duties must be paid, and the imported lead ore and its refined product placed upon the same footing with lead ore imported in the ordinary way and its product.

Other considerations will suggest themselves, but these are sufficient to explain the conclusion I have reached that when the refined metal produced from imported lead ore is

not exported within six months from the receipt of the ore the regular duties must be paid on the ore.

Respectfully,

JOHN K. RICHARDS,
Solicitor-General.

Approved.

JOHN W. GRIGGS.

The SECRETARY OF THE TREASURY.

DIRECTORS UNION PACIFIC RAILWAY COMPANY.

The Government directors of the Union Pacific Railway Company are chargeable with no duties or obligations in respect to the proceedings for the enforcement of the claim of the United States in the matter of the indebtedness of the Kansas Pacific Railway Company.

DEPARTMENT OF JUSTICE,
January 3, 1899.

SIR: In your communication to me under date of October 25, 1898, you ask my opinion whether the directors of the Union Pacific Railway Company are chargeable, under existing laws, with any duties or obligations in respect of the pending proceedings for the enforcement of the claim of the United States in the matter of the indebtedness of the Kansas Pacific Railway Company.

In reply, I have the honor to submit the following:

Section 1 of the act of July 1, 1862 (12 Stat., 489), which is the charter of the Union Pacific Railroad Company, provides for the appointment by the President of two Government directors of that corporation. The Union Pacific Railroad Company subsequently, by consolidation with other railroad companies, formed the Union Pacific Railway Company. By section 13 of the act of July 2, 1864 (13 Stat., 356), the number of these Government directors was increased to five, but by these sections and their appointment thereunder these directors became and were directors of that corporation only, and were chargeable with no duties or obligations except in respect of that corporation. These general duties are specified in the two sections referred to, and have relation to the management of the affairs of that company.

You transmit with your letter a copy of the report of the Government directors, dated September 30, 1898, showing, among other things, that by foreclosure proceedings instituted by the United States the whole railroad and telegraph line and property of the Union Pacific Railway Company, from Council Bluffs, Iowa, to a point about 5 miles beyond Ogden, in Utah (being the line in aid of which the Government subsidy bonds were issued), were sold under the decree of the United States circuit court, the sale confirmed, fully consummated, and deed transferring the property executed and delivered, from the proceeds of which the entire indebtedness of the Union Pacific Railroad Company to the United States was paid and extinguished.

By like proceedings, and under the decree of the same court, the railroad and telegraph line and property of the Kansas Pacific Railway Company (also a bond-aided corporation) were sold, the sale confirmed and fully consummated, and deed transferring the property executed and delivered. The proceeds of this latter sale fell short of paying the whole amount due the United States on account of its subsidy bonds. To collect this balance, proceedings have been instituted by me, as Attorney-General, on behalf of the United States, and are now pending in the proper court awaiting final determination according to the ordinary forms and procedure of that court. With these proceedings the Government directors would seem to have no concern, and in respect thereto they are chargeable with no duties or obligations.

I advise you, therefore, that the Government directors are chargeable with no duties or obligations in respect to these proceedings.

Very respectfully,

JOHN W. GRIGGS.

The SECRETARY OF THE INTERIOR.

INDEMNITY—LOST REGISTERED MAIL.

The act of February 27, 1897, authorizes the Postmaster-General to establish, as part of the system of registration, rules providing for indemnity for foreign as well as domestic first-class registered matter lost in the mail.

The rules promulgated pursuant to said act apply to both domestic and foreign registered mail matter, and no further legislation is required in order that the provisions of the postal convention relative to loss of registered matter may become operative or to make the Department liable to this limited extent for foreign first-class registered matter lost in the mails.

DEPARTMENT OF JUSTICE,
January 3, 1899.

SIR: By your communication dated September 26, 1898, I am requested to advise you whether, under the provisions of the act of February 27, 1897 (29 Stat., 599), the liability of the Post-Office Department can properly be extended to foreign registered mail matter lost in the mails, under the provisions of the Universal Postal Union Convention, or whether additional legislation by Congress is necessary before the provisions of the postal convention relative to losses of registered matter can be put in operation.

With reference thereto I have the honor to submit the following:

The answer to the question thus presented depends upon whether the act of February 27, 1897, and the rules and regulations adopted by the Postmaster-General thereunder, apply to foreign as well as to domestic registered mail matter.

Our postal registry system began with the act of June 8, 1872 (17 Stat., 300), section 126 of which provides: "That for the greater security of valuable mail matter, the Postmaster-General may establish a uniform system of registration." This is also the exact language used in the act of February 13, 1897, which provides for indemnity for lost registered articles.

The language of this provision is broad and general enough to include foreign as well as domestic registered mail matter, and in view of the fact that the foreign mails were such an important factor in our postal system, it is not to be supposed that Congress, in "An act to revise, consolidate, and amend the statutes relating to the Post-Office Department," and which provides for both foreign and domestic mails, and carefully distinguishes between them when a distinction is intended, should, in a new and important provision like this, use language clearly broad enough to include both unless

both were intended. I have no doubt that this original provision in the act of 1872 applied alike to both foreign and domestic mail matter, and authorized the Postmaster-General to establish a system for the registration of both.

And such appears to have been the construction given to it by the Post-Office Department; and, under this provision, the Postmasters-General have promulgated rules and regulations for the registration, transmitting, receiving, and delivery of both foreign and domestic mail matter, and such foreign matter has continued to be registered, transmitted, received, and delivered, and the fees therefor collected and retained, and under no other authority than this provision.

A reference to the rules and regulations of the Post-Office Department, as published in the United States Official Postal Laws and Regulations, will show that, under the provisions above referred to, the registration of foreign mail matter is fully recognized and provided for.

For instance, in the volume of the Postal Laws and Regulations of 1887, chapter 36, page 401, is entitled "Registration of Foreign Mail Matter," and is devoted to that subject.

And, indeed, I understand this to have been long the practice of the Department, and have no doubt that it is the correct one under this statute.

Then came the Universal Postal Union Convention of Vienna, July 4, 1891, article 6 of which provides that "the articles specified in article 5 may be registered." Article 5 specifies articles that would be included in our first-class mail matter and many that would not, and article 6 provides that—

"In case of the loss of a registered article, and except in case of *force majeure*, the sender or, at his request, the addressee is entitled to an indemnity of 50 francs."

But this is modified by section 11 of the final protocol of that convention, which provides that—

"In modification of the stipulations of article 8 of the convention it is agreed that, *as a temporary measure*, the administrations of the nations outside of Europe whose legislation is at present opposed to the principal of responsibility, retain the option of postponing the application of that principle *until they shall have been able to obtain from*

the legislative power the authority to introduce it. Up to that time the other administrations of the Union are not bound to pay an indemnity for the loss, in their respective services, of registered articles addressed to or originating in the said countries."

A careful reading of this article, especially in view of the universality and uniformity intended by this convention, will show, first, that the postponement by the countries referred to (of which this was the principal one) of the principle of indemnity was to be but temporary; and second, that such countries were bound to at least try to obtain an early legislative power to adopt it.

It is to be presumed that Congress was not ignorant of, but had this provision of that convention in mind in the passage of the act of 1897, which, though not authorizing the adoption of the principle of indemnity to the full extent expressed in that convention, did so to a limited extent, restricting it to the loss of first-class registered articles. Whether the other contracting nations were bound to accept this modified adoption or to reciprocate accordingly is not important here.

This act of February 27, 1897 (29 Stat., 599), provides that—

"For the greater security of valuable mail matter, the Postmaster-General may establish a uniform system of registration, and as part of such system, he may provide rules under which the sender or senders of first-class registered matter shall be indemnified for losses thereof in the mails."

This indemnity is not to exceed \$10 for any one registered piece.

It will be seen that the language of the first part of the section—that giving to the Postmaster-General power to establish a system of registration—is identical with that of the act of 1872, and, doubtless, it should receive the same construction, and if the latter authorized the registration of foreign mail matter so does the former.

But, independently of this, the language is broad enough to include both. And when we consider that this act was passed in view of the provisions of the Universal Postal Union Convention, which required at least some legislation,

and in view of the well-known practice of the Post-Office Department to register foreign mail matter, it seems clear that Congress intended that the system thus to be adopted should apply to both foreign and domestic mail matter, as it was, in fact, being then applied in practice, and of course if the registration provided for in the first part of the section applied to foreign mail matter, so did the indemnity thus authorized.

But the act itself creates no liability for such losses, but merely authorizes the Postmaster-General to establish rules which will do so, and under this provision he has promulgated the following rule, as published on page 11 of the United States Official Guide, for July, 1898:

“SECTION 1134½. Indemnity for loss in the mails of a registered piece of first-class mail matter will be paid in accordance with limitations prescribed in amended section 1031 of the Postal Laws and Regulations.”

The language of this section, like that of the statute authorizing it, is broad enough to cover foreign as well as domestic registered mail matter; and in view of the fact that it is a part of a carefully prepared system of rules and regulations for the registration of both foreign and domestic mail matter, and in which the provisions for each are carefully distinguished when a distinction is intended, but containing provisions common to both, it must be taken to have been intended to apply to both. But whether in fact it was actually so intended or not, its language makes no distinction, but is just as applicable to the one as to the other, and the situation called for at least just such a statute and such a regulation applicable to foreign registered mail matter, so that both the language and the requirements of the situation agree in this construction.

Nor is it perceived that a distinction, dependent upon whether the article was consigned within the United States or to be sent abroad, was at all necessary, as the latter case quite as much as the former required the protection afforded by registration.

I am of the opinion, therefore, that the act of February 27, 1897, authorized the Postmaster-General to establish, as part of the system of registration, rules providing for indem-

nity for foreign as well as domestic first-class registered matter lost in the mails; and also that the section of such rules above partially quoted, with the succeeding portions of the rule promulgated June 21, 1898, makes such provision, and applies to both domestic and foreign registered mail matter, and that no further legislation is required, either in order that the provision referred to of the Universal Postal Union Convention (to the limited extent mentioned) may become operative, or to make the Post-Office Department liable to this limited extent for foreign first-class registered matter lost in the mails.

Very respectfully,

JOHN W. GRIGGS.

The POSTMASTER-GENERAL.

APPROPRIATIONS.

The act of July 1, 1898, making an appropriation "to enable the Secretary of the Treasury to pay" a certain individual a specified amount, being mandatory, the Secretary has no discretion to pass upon the fact whether such amount or any portion thereof ought to be paid. The phrase "to enable" is in words only permissive and is governed by and does not govern the context.

DEPARTMENT OF JUSTICE,

January 4, 1899.

SIR: I have the honor to acknowledge the receipt of your letter of the 31st ultimo in which you say:

"I have the honor to state that, prior to July 24, 1897, when the bill was pending in Congress to repeal the provision of section 3341, Revised Statutes, allowing a deduction of 7½ per cent. upon all sales of stamps to brewers used in their business, certain brewers applied to L. W. Pratt, esq., then collector of the fourteenth district of New York, for large quantities of beer stamps, and deposited money or checks in payment.

"One of these parties was S. Bolton's Sons.

"Collector Pratt did not have sufficient stamps on hand to fill the orders in full but filled them in part and retained money or checks for other stamps for future delivery. In

certain cases he failed either to deliver the stamps, return the money or checks, or account for the money to the Commissioner of Internal Revenue. The matter was investigated, and it was ascertained that the collector had not accounted for amounts received from brewers. The amount involved in all cases was \$19,585.30. In the case of S. Bolton's Sons it was \$13,458.75, the balance of a check for \$18,500 left by S. Bolton's Sons with Collector Pratt, deducting the value of stamps delivered, \$5,041.25. Claims were made for the refunding of such amounts, but were rejected by the Commissioner of Internal Revenue on the ground that the brewers had no right to leave their money with the collector in payment for stamps to be delivered in the future, except at their own risk, and that the Government was in no way liable for the failure of Collector Pratt to account for the money so received." * * *

The act making appropriations for sundry civil expenses of the Government for the fiscal year ending June 30, 1899, approved July 1, 1898, contains the following provision:

"Reimbursement of S. Bolton's Sons: To enable the Secretary of the Treasury to pay S. Bolton's Sons the amount paid to the late collector of internal revenue for the fourteenth district of New York in advance for internal-revenue stamps, which stamps were never delivered to said parties, \$13,458.75.

"I have the honor to submit for your opinion the question whether the act is mandatory upon the Secretary of the Treasury and requires him to pay to the said S. Bolton's Sons the sum of \$13,458.75, or simply leaves it to his discretion and judgment to decide upon the facts whether such amount or any portion thereof ought to be paid, particularly in view of the decision of the Court of Claims above referred to."

The law quoted is an appropriation act. It enacts that "the following sums" are "appropriated for the objects hereinafter expressed. * * * Reimbursement of S. Bolton's Sons: To enable the Secretary of the Treasury to pay S. Bolton's Sons," etc. The facts and reason inducing such payment are stated. Nothing is said about a claim. Nothing is said about a reference to the Secretary of any

question. No action by the Secretary except that of paying the sum appropriated is spoken of.

With such an act upon what can we construct the theory that Congress intended him to adjudicate the claim? Not from the sole phrase "to enable" because it is in words only permissive, since it has long been settled that such phrases are governed by and do not govern the context. They are read as mandatory whenever to do so is more in harmony with the context. Whether mandatory or not the phrase suggests no claim and no question and no adjudication.

But had a claim been mentioned—claims are divided into contractual, sounding in tort and of moral, not legal, character. If there was a contractual claim there was no necessity for any new law, since the Court of Claims had ample jurisdiction of it. If in tort or moral, the facts being found by Congress, what propriety would there be in referring the question of law or moral obligation to the Secretary of the Treasury? He is not a judicial or quasijudicial officer, nor could he be supposed to know better than Congress how to resolve a question of that higher justice which is peculiarly within the province of Congress to dispense.

On the other hand, he is a paying officer, the drawer of warrants for payments from the Treasury.

I can not believe, therefore, that upon the weak and narrow foundation of the permissive phrase "to enable" we can build the conclusion that Congress found the facts, created a liability not existing under the prior laws, and intended to have the Secretary settle whatever question can be conceived of as remaining.

In my opinion the phrase "to enable the Secretary," so frequently employed throughout this statute, was intended to be as mandatory here as in the paragraph enabling the Secretary to pay \$7,000 to the widow of the late Justice Miller.

Respectfully,

JOHN W. GRIGGS.

The SECRETARY OF THE TREASURY.

STAMP TAX—LEGACIES.

The tax provided for in section 29 of the war-revenue law is upon such legacies and distributive shares arising from personal property as exceed \$10,000 in actual value, and not upon the gross amount of the estate in the hands of the executor or administrator.

A legacy or distributive share, in contemplation of law, does not pass to an executor or administrator, but passes through them to such person as is entitled.

DEPARTMENT OF JUSTICE,
January 5, 1899.

SIR: I have the honor to acknowledge receipt of yours of the 7th of November, 1898, inclosing a copy of a letter addressed to you by the Commissioner of Internal Revenue, in which he desires to be advised as to the construction of section 29 of the act of June 13, 1898, and you ask my opinion upon the same.

From the letter of the Commissioner I copy the following.

“Under the provisions of section 29 of the act of June 13, 1898, taxes are required to be paid on legacies or distributive shares arising from personal property only ‘where the whole amount of such personal property, as aforesaid, shall exceed the sum of \$10,000 in actual value passing after the passage of this act, from any person possessed of such property, either by will or by the intestate laws of any State or Territory.’ Does this reference to a sum exceeding \$10,000 in actual value mean the value of the entire personal property left by a person at his death; or does it mean the actual value of his property remaining for distribution to his legatees and distributees after the payment of all debts standing against the estate?”

“This question is now before this office in the following case, submitted at the instance of an executor of a will: A died, leaving a personal estate of \$12,000 and debts amounting to about \$2,500, leaving only about \$9,500 to be paid to his heirs and legatees. Will the executor have to pay any revenue tax under the act of June 13, 1898?”

The question presented by the Commissioner is, in substance, as to whether the tax provided for in section 29 is to be levied upon the gross amount of a deceased person's estate, which shall have come into the hands of the adminis-

trator or executor, or upon such portion of the estate as constitutes legacies or remains to be paid out to distributees.

So much of section 29 as it is necessary to quote in passing upon this question is as follows:

"That any person or persons having in charge or trust, as administrators, executors, or trustees, any legacies or distributive shares arising from personal property, where the whole amount of such personal property as aforesaid shall exceed the sum of ten thousand dollars in actual value, passing after the passage of this act from any person possessed of such property, either by will or by the intestate laws of any State or Territory, or any personal property or interest therein, transferred by deed, grant, bargain, sale, or gift, made or intended to take effect in possession or enjoyment after the death of the grantor or bargainer, to any person or persons, or to any body or bodies, politic or corporate, in trust or otherwise, shall be, and hereby are, made subject to a duty or tax, to be paid to the United States," etc.

The language of the act appears to me to be plain—so much so that it does not admit of a doubt. It refers not to the estates of deceased persons which may come to the hands of administrators or executors, but to legacies or distributive shares arising from personal property in charge of administrators, executors, or trustees. The law does not say that the estates of testators or intestates shall pay a tax, but that legacies or distributive shares arising from personal property, where the whole amount of such personal property as aforesaid shall exceed the sum of \$10,000 in actual value, are taxable. The term "as aforesaid," used in the portion of the law above quoted, can not refer to the estate from which a legacy or distributive share is derived, but it refers to the personal property constituting the legacy or distributive share.

I am confirmed in this construction of this act by the further provision of the section in regard to the amount of tax to be paid, for in each clause designating such tax the words used are "where the person or persons entitled to any beneficial interest in such property shall be," etc. It is the interest to which the beneficiary is entitled which the law intended to make the subject of taxation. For instance,

by way of illustration, if a testator, with an estate worth \$50,000, makes a bequest of \$25,000 to a person and the residue of the estate is consumed in the payment of debts, the whole estate goes into the hands of the executor, and yet only the legacy of \$25,000 would be taxable under the provisions of this act. I can illustrate further by taking a specific legacy of jewelry or plate. This is taxable or not, according to its actual value. If such legacy is worth exceeding \$10,000, then it is liable to the tax; if not, it is not taxable.

The same principle applies as to the estates of intestates, no matter what the gross amount which comes to the hands of the administrator may be. It is the amount which remains for distribution after the payment of debts which the law intends to tax. An illustration: Suppose an estate which comes to an administrator consists of \$100,000 in money or other personal property and the intestate owes upward of \$100,000. The entire estate will be consumed in the payment of debts. In such case the provisions of section 29 do not apply, because there is nothing for distribution; there can be no distributive shares. To levy a tax upon the \$100,000 in such case would not be taxing a legacy or distributive share arising from personal property, but it would really be levying a tax upon the property of a deceased person, which ought to go to pay his debts. It would be indirectly a tax upon the creditors of a deceased person and not upon a legatee or distributee. However, on the other hand, if the estate which comes to the hands of the administrator is of the value of \$100,000 and \$50,000 will pay debts and costs of administration, leaving \$50,000 for distribution to those entitled, such distributive shares of this \$50,000 (as the whole amount exceeds \$10,000) would be subject to the tax under the provisions of the act. It is the net amount which remains in the hands of the administrator for distribution to the next of kin or those entitled which constitutes distributive shares in the estate of a decedent.

The word "passing," which is used in the act, is also explanatory of its meaning. It, too, refers to legacies or distributive shares "passing" after the passage of the act. A legacy passes from the testator to the legatee. A distrib-

utive share passes from the intestate to the distributee. An executor or administrator is the mere agency or instrumentality to carry out the purposes declared in a will or to administer an estate of a deceased person according to the requirements of the law. A legacy or distributive share, in contemplation of law, does not pass to these agencies; it simply passes through them to such person as is entitled to the legacy or distributive share.

I hold, therefore, that it is the purpose of the law under consideration not to levy a tax upon the gross amount of estates in the hands of executors, administrators, etc., but to tax such legacies and distributive shares arising from personal property as exceed \$10,000 in actual value. The tax is upon the legacy or distributive share, not upon the estate.

Respectfully,

JAS. E. BOYD,

Assistant Attorney-General.

Approved.

JOHN W. GRIGGS.

The SECRETARY OF THE TREASURY.

CUBA—INSURGENTS.

The emergency fund of \$3,000,000 provided by the act of January 5, 1899, is intended to cover emergencies arising in the military administration of Cuba and other territory that has come into the possession of the United States through the operations of war. The President is authorized to do whatever he finds necessary or expedient for the proper administration of government in Cuba, having in view the pacification of the island and the establishment of order and industry. For the purpose of disbanding the insurgent forces in Cuba, the President is authorized to pay some or all of the soldiers of such forces either out of the revenues of the island or out of the emergency fund provided by the act of January 5, 1899.

DEPARTMENT OF JUSTICE,

January 14, 1899.

SIR: I have examined the question submitted to me by your communication of 12th instant, wherein, referring to the act of January 5, 1899, making appropriation to supply urgent deficiencies in the appropriations for the support of

the military and naval establishments for the remainder of the fiscal year ending June 30, 1899, you inquire if the President has power to use any part of the emergency fund of \$3,000,000 provided by said act for the purpose of paying off the Cuban insurgents, the sum so paid to be subsequently refunded from the revenue of the island. I understand you to mean by "Cuban insurgents" the organized forces of Cubans recently in the field in insurrection against the Spanish authorities of the island and still remaining as organized and undisbanded forces.

In order properly to understand the question submitted and the principles that will determine its solution, it is necessary to recur to the present conditions of government existing in Cuba.

By the protocol of August 12, 1898, between the United States and the Kingdom of Spain, Spain agreed to relinquish its sovereignty over Cuba, and by the treaty of Paris specifically ratified the preliminary agreement contained in the protocol. Although the treaty of Paris is not yet ratified, Spain has surrendered to the United States the possession and control of Cuba, and the government of the island is now being administered under the law of belligerent right by the military authorities of the United States, under the direction of the President as Commander in Chief. Although the protocol and the treaty of Paris provided for a final peace to be established, yet, inasmuch as the treaty has not been ratified, war still, in theory, prevails, and the government of the island continues to be exercised under the war power of the nation. It is correct, therefore, to assume that the emergency fund provided by the act of January 5, 1899, is intended to cover emergencies arising in the military administration of Cuba and other territory that has come into the possession of the United States and which remains in their possession through the operations of the war. Whatever, therefore, the President finds to be necessary or expedient for the proper administration of government in Cuba, having in view the pacification of the island and the establishment there of order and industry, he has authority under military law to do.

The United States at the present time is under the neces-

sity of garrisoning the island with large forces of troops, which are maintained out of the Treasury of the United States at great expense, and anything which will, in the sound judgment of the President, tend to reduce the necessity of maintaining such large forces, and enable him to more easily preserve order and administer government, is a proper means to a proper end. If the President be of opinion, as a matter of judgment, that the disbandment of the insurgent forces in Cuba is a desirable and useful measure in successfully carrying on the military administration which the United States maintain, and that such disbandment can be most efficiently promoted and accelerated by a payment to some or all of the soldiers of the insurgent forces, as is proposed, he would, in my judgment, have the right to make such payment, either out of the revenues of the island, which are levied and raised under the authority of belligerent right, or out of the emergency fund provided by the act referred to. The object of such payment is to facilitate and expedite the reduction of the island to a condition of order—an object quite as well to be subserved by such payment as by the employment of troops, police, and other agencies of control and government, all of which require a large expenditure of money.

Such payment, if made out of the appropriation, would not be strictly a loan. It would rather be an expenditure for the benefit of the people of Cuba, found to be necessary for the proper administration of the island, which, on every ground of justice and right, the United States could hereafter insist upon having repaid to them by the government to be hereafter established in the island, before we relinquish our control.

Very respectfully,

JOHN W. GRIGGS.

The SECRETARY OF WAR.

MILITARY RESERVATIONS—REVOCABLE LICENSES.

Such portion of the Fort Sill Military Reservation can be set apart as may be required for the erection of the necessary buildings to be used as a mission and school for the Apache prisoners of war.

The Secretary of War may make such rules and regulations as shall be deemed suitable and necessary to control the methods and operations of the persons engaged in this work.

DEPARTMENT OF JUSTICE,
January 19, 1899.

SIR: I beg to acknowledge receipt of your communication of January 7, 1899, transmitting a letter from Lieut. F. H. Beach, Seventh Cavalry, in charge of Apache prisoners of war, at Fort Sill, Okla., requesting authority for the establishment of a school and mission among said prisoners, etc. The proposed school and mission contemplates the imparting of religious instruction, the ordinary rudiments of education for the younger children, and instruction in civilized domestic pursuits, such as sewing, cooking, and laundering. You also transmit a letter from the Commissioner of Indian Affairs, in which he favors the establishment of such a school and mission, and suggests certain conditions upon which authority for temporary occupancy of a portion of the military reservation should be given, in case it should be desired to set aside a portion of the reservation for the exclusive use of the mission.

You ask my opinion whether the Secretary of War can lawfully grant a revocable license to an individual or organization for the erection, on a portion of the military reservation at Fort Sill, of a building or buildings to be used as a mission and as quarters for the necessary teachers and matrons connected therewith, as contemplated in the request of Lieutenant Beach.

The Indians referred to are prisoners of war, held in the custody of the military authorities of the United States, upon the military reservation at Fort Sill. I understand their term of imprisonment is indefinite, and that they comprise among their number men, women, and children. These Indians belong to one of the native races within our territory, who have always been considered entitled to the peculiar care and wardship of the United States, and to the benefit of improving and civilizing influences. It is therefore highly proper that while these particular Indians are held in military captivity they should not be deprived of the ordinary civilizing influences of rudimentary education and

religious instruction. Instruction in the usual trades, as well as in matters of ordinary education, and religious instruction, are furnished at the expense of the Government to ordinary convicts in the prisons and reformatories conducted under the administration of the Department of Justice for the United States. I perceive no reason why a similar beneficent practice should not be applied in the case of these unfortunate Indian prisoners.

I therefore see no legal objection to the setting aside of a particular part of the reservation, in such place and to such extent as may be appropriate for the purpose of providing such accommodations as may be necessary for the kind of instruction contemplated in the letter of Lieutenant Beach. I would not recommend that this be done in the form of a lease or concession to any individual or association, but that permission be given to the proper persons or to a proper association to furnish this instruction to the Indians upon the military reservation, not as a privilege or concession, but as a means of furnishing on behalf of the Government, though at the expense of other persons (there being, as I understand it, no appropriation for this purpose), the opportunities for improving their estate which are accorded to ordinary prisoners in Federal prisons.

It would be competent and proper for the Secretary of War to make such rules and regulations as upon consideration he should deem suitable and necessary to control the methods and operations of the persons engaged in this work. Upon the basis which I have suggested, no right, title, or interest of any kind would vest in the persons or association who might undertake this enterprise, but it would be in effect carried on on behalf of the Government. This view of the case involves no conflict with the previous decisions of this Department with reference to applications made for special license to occupy lands of the United States within the boundaries of military reservations.

Very respectfully,

JOHN W. GRIGGS.

The SECRETARY OF WAR.

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SABINE PASS.

The location of the custom-house outside of the corporate limits of the municipality known as Sabine Pass complies with the act of June 23, 1898, and it is not necessary that it should be removed to a point within the corporate limits.

The term "port" may comprehend the city or town occupied by the importers, merchants, and others, but it is not confined in its extent or its limits to the town. It includes the harbor, roadstead, and shores, and all other natural and local incidents which go to make up a locality which comprises both land and water.

DEPARTMENT OF JUSTICE,

January 19, 1899.

SIR: By a letter bearing date October 31, 1898, you transmitted to me certain papers relative to the location of the custom-house at Sabine Pass, Tex., and requested my opinion as to whether, in view of the provisions of the act of Congress approved June 23, 1898, establishing Sabine Pass a subport of entry, the custom-house may be continued at its present site outside the corporate limits of the village or city of Sabine Pass, or whether it is necessary that it be removed to a point within said corporate limits.

In compliance with your request, I have the honor to advise you as follows:

The act of Congress above referred to is entitled "An act making Sabine Pass, in the State of Texas, a subport of entry and delivery." (Statutes of 1898, p. 487.)

The question of difficulty in the case is as to what is intended by the name "Sabine Pass" as used in this act.

It is claimed, on the one hand, that "Sabine Pass," as used in this act, is intended to specify a certain incorporated city or village of that name, which was incorporated by proceedings taken under and by virtue of an act of the legislature of Texas in the month of April, 1898. The name "Sabine Pass," it is conceded, is also applicable to a channel of navigable water which connects Sabine Lake with the Gulf of Mexico, a channel some 6 or 8 miles in length and forming the boundary line between the State of Texas and the State of Louisiana. The town or village of Sabine Pass was incorporated with certain fixed boundaries, which included only a portion of the territory lying on the Texas side of Sabine Pass.

It is claimed, on the other hand, that "Sabine Pass," as used in the act of June 23, 1898, was intended to include not only the town or village which bears that name, but also the pass itself and the port or harbor existing in connection therewith.

The act making Sabine Pass a subport of entry and delivery was introduced in the Senate of the United States prior to March 2, 1898. It is certain that at that time it could not have had reference to the incorporated municipality of Sabine Pass, because that corporation had not yet been erected. The proceedings for the incorporation of this municipality were taken in the following month of April. These proceedings were certain formulæ necessary to be complied with under the general laws of the State of Texas in order to erect a local municipal corporation, and involved a popular election within the proposed limits of the municipality. I am not advised as to what record or publication was required to be made of these proceedings, but it is unreasonable to suppose that the Congress of the United States was bound to take notice of it. In the absence of evidence to indicate by positive words or necessary implication a change in Congressional purpose as to the meaning of the name "Sabine Pass," as used in the act in question when finally passed, from what was intended by the name when the bill was introduced, it is only reasonable to suppose that Congress intended the name to have the same significance at both periods. There is no inflexible rule of law which requires one or the other of two localities having the same name to be adjudged as the one intended by a legislature in an act of legislation merely because one is a specially defined municipality and the other a region or locality, embracing not only the municipality, but a port and harbor and surrounding region. That construction will prevail which is most consonant with reason in view of the facts which can properly be supposed to have been before Congress, and also in view of the use previously made of the same name in other legislation.

It will be found, by reference to the statutes, that Congress has legislated many times with reference to the locality known as Sabine Pass. In the statutes of 1898 (p. 249) is

found an act making an appropriation available for operating a dredge boat at Sabine Pass, Tex., for use in the harbor improvement at Sabine Pass.

In the naval appropriation bill approved May 4, 1898 (statutes of 1898, pp. 369-379), is a provision directing the Secretary of the Navy to appoint a board to determine the desirability of locating and constructing a dry dock, of sufficient capacity to take the largest naval ship, in the harbor of Sabine Pass.

In the sundry civil bill of the same year (statutes of 1898, p. 631) is an appropriation for continuing the improvement of the harbor at Sabine Pass.

Joint Resolution No. 41 (statutes of 1898, p. 745), calls upon the Secretary of War for information concerning the port of Sabine Pass.

These instances of legislation above cited were practically concurrent with the act of June 23, 1898.

There were also instances of previous legislation by Congress relating to Sabine Pass, some of which I cite:—

In the river and harbor act of June 3, 1896 (29 Stats., p. 209), is an appropriation for improving the harbor at Sabine Pass, Tex.

A similar appropriation, in similar language, is in the appropriation bill of 1897 (acts 1st sess. 55th Cong., p. 45).

In the same volume (p. 48) is an appropriation for the purchase of a dredge boat for use in the harbor improvement at Sabine Pass, Tex.

In an opinion rendered November 20, 1860 (9 Op., 516), Mr. Attorney-General Black declared:

“A port is a place to which merchandise is imported and from whence it is exported. It is not merely a harbor or haven, for it may be established where there is nothing but an open roadstead, or on the shore of a navigable river, or at any other place where vessels may arrive and discharge or take in their cargoes. It comprehends the city or town which is occupied by the mariners, merchants, and others who are engaged in the business of importing and exporting goods, navigating the ships, and furnishing them with provisions. It includes also so much of the water adjacent to the city as is usually occupied by vessels discharging or

receiving their cargoes or lying at anchor and waiting for that purpose."

This statement of Attorney-General Black properly describes the ordinary as well as the legal characteristics of a port. It may comprehend the city or town occupied by the importers, merchants, and others, but it is not confined in its extent or its limitations to the town. It includes properly, and within both legal and popular conception, the harbor, the roadstead, the shores, and all other natural and local incidents which go to make up a locality which comprises both land and water.

In the report of Deputy Collector Niland to the collector of customs at Galveston, under date August 17, 1898, which report is transmitted with your communication, it is stated that within the strict corporate limits of the municipality of Sabine Pass there is not a wharf, a slip, or a pier for the accommodation of vessels; that vessels coming in that neighborhood to unlade or load their cargo have to lie at anchor in the river while their cargo is discharged or ladened from barges moved alongside, while at the point where the custom-house is now located, outside of the municipal limits, are slips and docks in which vessels lie and discharge and load their cargo. It is fair to presume that Congress, in creating a subport of entry in this locality had knowledge of this condition of things, and it would be to convict Congress and the officers of the customs service with gross ignorance of necessary facts that should be within their official knowledge to assume that it was the intention of Congress to require the custom-house to be located at a place not fitted with the ordinary appliances and accommodations for shipping.

I therefore advise you that the custom-house, as located outside of the corporate limits of the municipality known as Sabine Pass, complies with the act of Congress, and that it is not necessary that it should be removed to a point within said corporate limits.

Very respectfully,

JOHN W. GRIGGS.

The SECRETARY OF THE TREASURY.

CUBA—CLAIMS—CONTRACTS.

The question whether the claims of a certain company relating to the performance of a contract entered into with the city of Havana are sufficiently complete to constitute a contractual relation and whether they ought to be ultimately recognized and confirmed is such as should be left to the decision of the authorities of Havana.

The administration of the United States in Cuba being of a military nature and merely temporary, no action should be taken to bind the island or any of its municipalities to large expenditures, except upon grounds of immediate necessity.

DEPARTMENT OF JUSTICE,

January 19, 1899.

SIR: I have the honor to acknowledge receipt of your communication of 17th instant, relative to the alleged claim of Michael J. Dady & Co. as to certain contract relations between them and the city of Havana relative to sewerage and paving said city. You advise me that a plan of financing said contract was in progress of arrangement between Dady & Co. and the authorities of the city of Havana on December 18, 1898, at which time Captain-General Castellanos, at the request of the United States, issued an order suspending action on the same. You advise me that Dady & Co. have requested the War Department to remove said order of suspension in so far as it applies to them, and before taking action thereon you desire my opinion upon the following questions:

First. Under the plans and specifications which Dady & Co. have submitted to the authorities of the city of Havana, have Dady & Co. the right to have the same appraised? Is Dady & Co. entitled to the amount of such appraisement before the city uses such plans and specifications?

Second. In the event of the city of Havana advertising for bids of the work in question, have Dady & Co. the right of taking such work at the price of the lowest bidder to whom it may be awarded?

Third. Is the order of December 18, 1898, of Captain-General Castellanos suspending action of the local authorities upon all contracts referring to the sewerage of Havana still operative, until removed by the military governor appointed by the United States, or are the local authorities

of the city of Havana now free to proceed with the matters under consideration, without an order of the military governor repealing such order of December 18, 1898?

The completion of the proposed contract between Dady & Co. and the city of Havana would involve an expenditure for the benefit of that city of \$14,000,000, to be secured by an issue of municipal bonds. It is manifest that a matter of such great importance to the city of Havana, its citizens and taxpayers, ought not to be determined without a full and complete understanding of all the facts and a thorough knowledge of the civil law applicable thereto under the system prevailing in Cuba. This Department is not at this time in the possession of the necessary legal knowledge to enable it to answer satisfactorily the questions you propound. I have no doubt that the local authorities of the city of Havana are properly restrained by the orders issued by Captain-General Castellanos in December last. I am equally clear that no removal of the restraint contained in said order ought to be made by the military authorities of the United States at the present time. The importance of the matter involved and the difficulty of understanding the rights and interests of the people of Havana with reference thereto are sufficient and conclusive reasons for such a course. The administration of the United States in Cuba is of a military nature, and merely temporary. No action binding the island or any of its municipalities to large expenditures and continuing debt ought to be made, except upon grounds of immediate necessity, which in this case do not appear to be present.

Whether the claims of Dady & Co. are well founded, whether they are sufficiently complete to constitute a contractual relation, and whether the authorities of Havana ought ultimately to recognize and confirm them are questions which ought to be left to the decision of the authorities of Havana—not while that city is in the disturbed and partially disorganized condition consequent upon a recent war and a change of national sovereignty, but when it shall hereafter have resumed its normal functions under such conditions of order and tranquillity as will permit its authorities to deal intelligently and justly with the subject.

I therefore recommend that no action be taken in this matter at the present time further than the ascertainment of such facts relative to the claim of Dady & Co. as are obtainable through the military governor of Cuba or the more immediate authorities of the city of Havana.

Very respectfully,

JOHN W. GRIGGS.

The SECRETARY OF WAR.

NAVIGABLE WATERS.

Section 5 of the act of August 18, 1894, does not, of its own force, prohibit the Lehigh Valley Railroad Company from exercising its privilege under the New Jersey statutes of closing its drawbridge over the Passaic River a reasonable time for repairs.

DEPARTMENT OF JUSTICE,

January 28, 1899.

SIR: I am in receipt of your communication of this date, inclosing certain correspondence submitted to you by the Lehigh Valley Railroad Company, relative to the proposed closure of the drawbridge maintained by that company across the Passaic River, in the State of New Jersey, for a period of twelve days, in order to permit the company to make necessary repairs, which can not be done properly and with reasonable dispatch with the draw of the said bridge open.

The Passaic River is a navigable water of the United States, and used as a channel of interstate commerce. The Lehigh Valley Railroad Company operates a railroad extending through the States of New Jersey, Pennsylvania, and New York, which is also one of the instruments of interstate commerce. The bridge in question was erected under the authority of the legislature of the State of New Jersey, which State, by an act approved April 8, 1892, has made the following provision of law with reference to repairs of drawbridges of this character:

“That whenever it shall be necessary to repair or rebuild any bridge or viaduct in this State over any navigable river or water, the public authorities, corporation, or person so repairing or rebuilding such bridge or viaduct, shall not

be liable for damages occasioned by obstructing or stopping navigation thereby: *Provided*, The said repairs or rebuilding and obstructing or stopping of navigation be done between the first day of February and the twentieth day of February: *And provided further*, That said repairs or rebuilding be prosecuted with all practical dispatch: *And provided further*, That notice of such intended repairs or rebuilding be given at least three weeks prior to commencing the same by publishing a notice thereof in some newspaper circulating in the county adjacent to such bridge or viaduct."

The Lehigh Valley Railroad Company, having given the notice required by this act, has received notice from Col. J. N. Barlow, of the Corps of Engineers of the United States Army, at New York City, intimating that the proposed closing of the draw is in violation of section 5 of the river and harbor act of August 18, 1894 (28 Stat., 362), which reads as follows:

"That it shall be the duty of all persons owning, operating, and tending the drawbridges now built, or which may hereafter be built, across the navigable waters of the United States, to open, or cause to be opened, the draws of such bridges under such rules and regulations as in the opinion of the Secretary of War the public interests require to govern the opening of drawbridges for the passage of vessels and other water crafts, and such rules and regulations, when so made and published, shall have the force of law: * * * *Provided further*, That whenever, in the opinion of the Secretary of War, the public interests require it, he may make rules and regulations to govern the opening of drawbridges for the passage of vessels and other water crafts, and such rules and regulations, when so made and published, shall have the force of law, and any violation thereof shall be punished as hereinbefore provided."

I am advised that no rules or regulations have been adopted by the Secretary of War in pursuance of this statute.

The question submitted to me for my opinion is as to whether this statute, of its own force and without rules and regulations, prohibits the closing of the drawbridge, as is proposed by the Lehigh Valley Company for the purpose of

repairs, in pursuance of the statute of New Jersey above quoted.

In my opinion it does not. As I read section 5 of the river and harbor act of 1894, it does not add anything to the law previously in force upon this subject, except that it gives authority to the Secretary of War to adopt rules and regulations to govern the opening of such drawbridges for the passage of vessels and other water crafts, which rules and regulations, when made and published, shall have the force of law. No regulations having been made or published, the law is, so far at least, ineffective. The declaratory part of the law, to wit: "That it shall be the duty of all persons owning, operating, and tending drawbridges to open, or cause to be opened, the draws of such bridges, under such rules and regulations as in the opinion of the Secretary of War public interest requires," etc., if read merely as a declaration of ordinary duty, severed from the provision authorizing the Secretary to adopt rules and regulations, is no more than an ordinary statement of the obligation which attaches to the maintenance and operation of a drawbridge across navigable waters. It is the duty of all persons operating such drawbridges to open or cause them to be opened in a reasonable manner and at a reasonable time, consistent with the uses for which drawbridges are constructed, for the passage of vessels. The repair of such draws and of the bridges with which they are connected is also necessary for their maintenance. It is reasonable that a sufficient time should be allowed for such repairs, and if they can not be prosecuted without closing the bridge for a number of successive days, such closing can not be considered an unreasonable interference with navigation. The right of navigation upon the stream considered as a subject of Federal supervision and control, because connected with interstate commerce, is of no greater importance than the operation of a railroad which is engaged in the same business. Each should have reasonable opportunity to conduct its business without undue interference with the business of the other. Such seems to be the consideration which was at the basis of the statute of New Jersey above quoted.

In my opinion, under the circumstances that appear in

this case the Lehigh Valley Railroad Company ought not to be interfered with by the War Department in the exercise of its privilege, under New Jersey law, of closing the bridge a reasonable time for necessary repairs. It is entirely competent for the Secretary of War to make rules and regulations governing this subject, but in the absence of such rules and regulations the law is as I have above stated it.

Very respectfully,

JOHN W. GRIGGS.

The SECRETARY OF WAR.

INDEMNITY—CABLES.

Property of a neutral, permanently situated within the territory of an enemy, is, from its situation, liable to damage from the lawful operations of war, and no compensation is due for such damage.

There is no ground to support the claim for indemnity of the British Eastern Extension Australasia and China Telegraph Company for cutting the cable at Manila during the war with Spain.

DEPARTMENT OF JUSTICE,

February 1, 1899.

SIR: I have the honor to acknowledge the receipt of your letter of 16th instant relative to a claim of the British Eastern Extension Australasia and China Telegraph Company for damages and losses alleged to have been sustained in consequence of the cutting of its cable at Manila during the war with Spain and asking for an opinion as to whether this Government is in any way liable for those damages and losses.

Your letter is accompanied by correspondence explanatory of the case and an opinion of Sir R. T. Reid, Q. C., M. P., and Mr. Henry Sutton favorable to the validity of a demand for indemnity to the extent of the amount expended in repairing the cable.

I understand that it is to this demand that the claim in question is limited; that it is not denied that the cable was properly cut as a necessary war measure, and is not pretended that the interruption of traffic over the cable, in the circumstances existing at Manila, is regarded as giving rise

to any right of indemnity, since these points are discussed in the opinion referred to and decided favorably to this Government.

It is true, as suggested in that opinion, that a cable is a new and peculiar species of property and that a precedent based upon the cutting of a cable is difficult to find; but the strict law applicable to the case does not, on that account, become doubtful.

Property of a neutral permanently situated within the territory of our enemy is, from its situation alone, liable to damage from the lawful operations of war, which this cutting is conceded to have been, and no compensation is due for such damage.

It is said, however, that this rule has never been applied to a cable; that the whole utility of the cable over many miles is as much destroyed by cutting it in territorial waters as by cutting it on the high seas, which last act, it is claimed, would undoubtedly entitle the owners to compensation; and that the United States admiral did not merely aim at preventing the use of the cable by the Spaniards, but also at using it himself.

Do these reasons withdraw this property from the rule which has been stated?

In the first place, that is a rule applying to property of a neutral which he has placed within the territory of our enemy, which property our necessary military operations damage or destroy. It takes no account of the character of the property, but only of its location, and no account of any motives of its owner or of the military officer who finds it necessary to meddle with it in hurting the enemy. He sees it across his path and brushes it away, and the rule cited says that the owner, by putting his property in the country, took the chance of a war against it and of all lawful military acts to carry it to a successful issue.

It argues nothing that cables have not heretofore been the subject of any discussion of this rule. The same might be said of many kinds of property, either because they happened not to be injured or because the rule was so well understood that a discussion was deemed superfluous. It is

necessary to show why the cable property is exempt from the rule, and not that the rule has ever been applied to it.

The reasons suggested do not seem to me to bear examination.

It is said that the whole utility of the cable is destroyed for many miles by a cutting within territorial waters; in other words, that the damage extends outside of territorial waters. But is this true? Undoubtedly the interruption of traffic over it does or may extend for many miles; but the interruption of traffic is not the basis of the claim. When repaired, it was repaired, as it had been cut, within territorial waters, and was then the same as before the injury. It was possible to take up the outer end and operate the cable to Hongkong from the time it was cut; and it was the sealing of the cable at Hongkong, and not the cutting, which prevented this from being done. It seems to me, therefore, that the injury by cutting can properly be regarded as in no way withdrawn from the rule by reason of its supposed extension beyond territorial waters, even if an extension of the injury could in any case alter the rights of the belligerent.

As for the suggestion that there is no difference between a cutting within and a cutting without territorial waters, since the destruction is the same, this might be somewhat varied between a damage and a destruction. That is to say, if the act within territorial waters had effectually and permanently paralyzed the whole cable, it might possibly be regarded as one whole thing and not situated in the enemy's country. But this consideration loses all its force, if any it has, when we consider that the parting of a cable is a comparatively insignificant damage, easily repaired, and not unfamiliar in the ordinary working of such a property.

The obvious difference between a cutting within and a cutting without the territorial waters, however it may be equally troublesome to the owner, goes to the foundation of the rule authorizing the destruction of property because it is within the territory. It is equally troublesome to the owner of any property to have it destroyed or injured in or out of the enemy's country. This, however, does not affect the belligerent's rights with regard to his property within the enemy's country.

To say that the American Admiral desired to use the cable himself, as well as to prevent the Spanish Government from using it, is but to attribute to him a motive in addition to one which justified his act. This can in no way diminish the right to cut the cable, nor, seeing that he did not use it, can it give rise to any different rule as to compensation.

I am of opinion, therefore, that, upon the law of the case, there is no ground for the claim to indemnity.

Respectfully,

JOHN W. GRIGGS.

The SECRETARY OF STATE.

STAMP TAX—REINSURANCE POLICIES.

Reinsurance policies need not be stamped under the war-revenue law of June 13, 1898.

DEPARTMENT OF JUSTICE.

February 3, 1899.

SIR: I have the honor to acknowledge receipt of yours of October 18, 1898, asking my opinion as to whether, under the provisions of the war-revenue act, what are called reinsurance policies, issued by insurance companies, are required to be stamped.

The Commissioner of Internal Revenue, in his letter of October 12, 1898, to you upon this subject, and which you inclose, says: "This question of reinsurance relates only to the assumption by one insurance company of a part of a risk taken by another on receiving a proportionate part of the premium that was originally paid. It is of no interest to the beneficiary or the party primarily insured, except perhaps as the double insurance may contribute to his benefit in case of the insolvency of the company with which he originally contracted," and in the statement filed by the representative of the insurance companies in this matter it is said that a reinsurance policy "is substantially an agreement between two life companies sharing, according to the terms of the contract, the risk which, prior to such agreement, was being carried by one of the companies."

The provision of the act of June 13, 1898, applicable to this subject is the paragraph of Schedule A under the head of "Insurance (life)," and is as follows:

"Policy of insurance or other instrument, by whatever

name the same shall be called, *whereby any insurance shall hereafter be made upon any life or lives*, for each one hundred dollars or fractional part thereof, eight cents on the amount insured."

Upon the facts given by the Commissioner, which appear to be in harmony with those furnished by the representative of the insurance companies, these contracts, which are made exclusively between the insurance companies themselves, and after the original policy of life insurance to the individual has been issued, could not be construed as instruments whereby insurance is made upon life or lives. The insurance upon the life is made by the original policy or instrument which is issued as evidence of the contract between the insurance company and the assured. After this contract is completed, as I understand it, insurance companies, in order to divide the risk, adopt this plan of reinsurance, as they call it, by which some company other than that which issued the policy, in consideration of a portion of the premium, agrees to assume part of the risk; and it is to evidence this contract that what are called reinsurance policies are issued, not to the assured in the original policy, but to the company which is the original insurer. To require a stamp upon such a contract after the original policy issued to the assured has been duly stamped would be, in effect, to levy a double tax on a single transaction for life insurance, which I do not think the law contemplates, and which its proper construction will not sustain.

Further than this, as I have stated before, there is no insurance made upon any life or lives by these contracts between the insurance companies. The assured is no party to them, and has no interest in them, except, perhaps, in so far as security for the payment of the policy may be increased. But I do not think this sufficient to subject contracts such as are above described to stamp taxes.

Very respectfully,

JAS. E. BOYD,

Assistant Attorney-General.

Approved.

JOHN W. GRIGGS.

The SECRETARY OF THE TREASURY.

NATIONAL BANKS—TAX.

The surplus required to be set apart by the national-banking act from the net proceeds until it reaches an amount equal to 20 per cent of the capital stock becomes by law in effect a part of the bank's capital.

The term "surplus," as applied to banks, includes not only the amount set apart as a minimum surplus, but also such amount as has been set apart by a vote of the directors or other authorized action of the bank to strengthen the capital, and is thus held out to the public as a part of its banking capital.

State banks are taxable upon the amount of their capital, together with such additional surplus or funds belonging to them as may be set apart either by law or by the action of the bank authorities and used in carrying on the general business of the bank.

The undivided profits of a bank are not surplus, and can not be estimated under the war-revenue act as a part of the bank surplus.

The capital of a bank and other funds belonging to it which, by law or the action of the bank authorities, assume the character of capital, and which the bank uses in carrying on its business, is what the law has in view as the subject of taxation.

The tax referred to in paragraph 1 of the act should be computed on the basis of the capital and surplus for the fiscal year preceding the time at which the assessment is made.

Profit is the gain made upon any business or investment when both the receipts and payments are taken into account.

DEPARTMENT OF JUSTICE,
February 4, 1899.

SIR: In your letter of October 1, 1898, which I have the honor to acknowledge, you submit the following questions for my opinion:

"First. Are the undivided profits of a national bank to be excluded in all cases from the capital and surplus in estimating the amount of special tax required to be paid by the bank under section 2 of the war-revenue act?

"Second. Are the undivided profits of a State bank to be excluded in all cases from the capital and surplus in estimating the amount of special tax required to be paid by the bank under that section?

"Third. Are the undivided profits of private banks or bankers to be excluded in all cases from the capital and surplus in estimating the amount of special tax required to be paid by the bank or bankers under that section?

"Fourth. What is the construction that should be given

to the following language in paragraph 1 of that section, namely: 'The amount of such annual tax shall in all cases be computed on the basis of the capital and surplus for the preceding fiscal year?'"

The provision of law under which these questions arise is the following portion of section 2 of the act of June 13, 1898:

"SEC. 2. That from and after July first, eighteen hundred and ninety-eight, special taxes shall be, and hereby are, imposed annually as follows, that is to say:

"One. Bankers using or employing a capital not exceeding the sum of twenty-five thousand dollars shall pay fifty dollars; when using or employing a capital exceeding twenty-five thousand dollars, for every additional thousand dollars in excess of twenty-five thousand dollars, two dollars, and in estimating capital surplus shall be included. The amount of such annual tax shall in all cases be computed on the basis of the capital and surplus for the preceding fiscal year." * * *

I think that I can more readily answer the first three questions by giving my opinion as to what should be included for taxation than by undertaking to determine what should be excluded.

The purpose of the law is, undoubtedly, to levy an annual tax upon the business of banks and bankers, and, in order to make uniformity, to apply the tax to the amount of capital employed together with such surplus funds of the bank as are used in carrying on the business and which, combined with the capital, constitute the basis of banking operations.

The national-banking act provides for the maintenance by national banks of what is called a "surplus," which is required to be set apart by the directors of the bank from the net profits until it shall reach an amount equal to 20 per centum of the capital stock. This surplus thus constituted becomes, by law, in effect a part of the bank's capital, and this 20 per centum is the minimum amount of surplus to be maintained by a national bank.

I do not conceive, however, that the amount of the capital with this surplus added would make the limit to which the taxing power is authorized to go in every instance in esti-

inating the amount upon which the bank should be assessed. I understand the term "surplus" as applied to banks to have a broader meaning, and it should be construed to include, not only that set apart as the minimum surplus, but also such amount as has been set apart by a vote of the directors or other authorized action of the bank, to strengthen the capital, and is thus held out by the bank in its dealings with the public as a part of its banking capital. The capital of a bank, together with the surplus so set apart and used in conjunction therewith as the basis of its business transactions and its banking operations, constitutes the security upon which customers rely and which induces the public to deal with it.

I may present the matter more clearly by an illustration as follows:

A national bank with a capital stock of \$200,000 is required by law to set apart, from its net profits, and to maintain a surplus of \$40,000. The lowest estimate for taxation under the war-revenue act upon such bank would be upon \$240,000. But if this bank, by the action of its directors, should set apart \$100,000 more of the bank's funds to be used as a part of its banking capital, this latter amount would have to be added to the amount for taxation.

The same principle would apply to State and other banks, and, whilst there may be no State laws requiring the maintenance of a surplus on the part of State banks, yet such banks are taxable upon the amount of their capital together with such additional surplus or funds belonging to them as may be set apart, either by law or by the action of the bank authorities, and used in carrying on the general business of the bank.

The undivided profits of a bank are not surplus and can not be estimated under the law in question as a part of the bank surplus. Mr. Justice Swain, in delivering the opinion of the Supreme Court in *Rubber Company v. Goodyear* (9 Wall., 788), says:

"Profit is the gain made upon any business or investment when both the receipts and payments are taken into account."

This is the generally accepted definition of the term "profits."

So then, if profits are to be made the basis of taxation, it might be necessary to settle the affairs of a bank before the amount subject to taxation could be ascertained. The solvency of its loans, the shrinkage of securities, depreciation in values, and all other losses would have to be taken into account before the estimate as to profits could be made.

The undivided profits of a bank signify the amount of money on hand out of which dividends may be declared, and such profits may be in the bank to-day, and, by action of the directors, distributed among the stockholders to-morrow, and thus cease to be within the control of the bank at all. It certainly could not have been the purpose of Congress to levy an annual tax upon funds of this character.

And then, so far as the taxation under the war-revenue act is concerned, it is not important whether a bank has any profits or not. It is, as before stated, the capital of the bank and other funds belonging to it, which by law or the action of the bank authorities assume the character of capital and which the bank uses in carrying on its business, that the law has in view as a subject of taxation.

I think I have sufficiently answered the first three questions.

In the fourth question it is desired that I construe that part of the act which says:

"The amount of such annual tax shall in all cases be computed on the basis of the capital and surplus for the preceding fiscal year."

I think that I am safe in assuming that the term "fiscal year" used in this act was intended to refer to the fiscal year which is established by the laws of the United States (§237 Rev. Stat.), which is as follows:

"The fiscal year of the Treasury of the United States in all matters of accounts, receipts, expenditures, estimates, and appropriations, * * * shall commence on the first day of July of each year; * * * "

and further, section 3146, Revised Statutes, under Title XXXV, Internal Revenue, provides:

"In adjusting the accounts of collectors, accruing after June thirtieth, eighteen hundred and sixty-four, and in the

payment of their compensation for services, the fiscal year of the Treasury shall be observed."

I would advise, therefore, that the tax should be computed on the basis of the capital and surplus for the fiscal year preceding the time at which the assessment is made—that is, the assessment should be on the capital and surplus in use by the bank for the year ending the 30th of June next before the tax is assessed. This method would secure more uniformity and would apply the fiscal year provided by the laws of the United States to all banking establishments which are subject to taxation under this law.

As to the amount upon which a bank should be assessed for taxation during the year, in some instances this might vary. There might be a reduction or an increase of capital or surplus, or both, during the fiscal year, which is to furnish the basis for estimating the tax. That is, a bank with a capital of \$100,000 might decrease its capital to \$50,000, or increase it to \$200,000, during the year, and changes of like nature might occur as to the surplus. In such cases, of course, some fair ascertainment of the average capital and surplus employed during the year will have to be made in order to arrive at the amount liable to assessment.

Very respectfully,

JAS. E. BOYD,

Assistant Attorney-General.

JOHN W. GRIGGS.

Approved.

The SECRETARY OF THE TREASURY.

CHINESE.

A Chinese proprietor of a restaurant was duly classified as a merchant and obtained the necessary certificate entitling him to reenter the United States. At the time of his return to this country such persons were deemed laborers and he was refused admission. *Held*, That as he had been regularly classified as a merchant the Department should not, in fairness, refuse to recognize him as such and he should be admitted.

The authority vested in the Secretary of the Treasury by the act of August 18, 1894, to determine finally and conclusively whether or not a Chinese person shall be admitted to this country, may be exercised in such manner as will keep faith and do no injustice to a Chinese who seeks to return.

DEPARTMENT OF JUSTICE,
February 8, 1899.

SIR: In your communication of the 14th ultimo, you state that, on May 27, 1893, your Department held, in a letter to the collector of customs at Burlington, Vt., that Chinese persons who are proprietors of restaurants in this country are not laborers within the meaning of the Act of May 5, 1892 (27 Stat., 25), and that Chinese proprietors of restaurants who departed from the United States were therefore allowed to reenter it. This ruling was based upon Mr. Attorney-General Olney's opinion of May 26, 1893 (20 Opin., 602), and was promulgated by your Department in the published synopsis of its rulings and decisions arising under the laws relating to the Chinese (p. 10, par. 33).

You state further that the attention of your Department having been subsequently called to the case of *In re Ah Yow* (59 Fed. Rep., 561), decided January 16, 1894, and *United States v. Chung Ki Foon* (83 Fed. Rep., 143), decided October 27, 1897, in which it was held that the words "Chinese laborers," in the Chinese exclusion acts, include Chinese engaged in the business of keeping restaurants. On November 15, 1898, you changed your former ruling and held, and now hold, that, in view of the decisions cited, Chinese proprietors of restaurants are to be deemed Chinese laborers and are not entitled to return to the United States under the provisions of law applicable to Chinese merchants.

The seventh section of the act of May 5, 1892, empowers the Secretary of the Treasury to make such rules and regulations as may be necessary for the efficient execution of the act.

It appears from the paper accompanying your communication that, during the time when the ruling of your Department was that a keeper of a restaurant is not a laborer but a merchant, entitled to depart from and to reenter this country, one Young Tai, a proprietor of a Chinese restaurant in New York, was duly registered at the office of the collector of internal revenue, and a certificate of residence issued to him, in which he was described as being a "person other than a laborer," and his occupation as a merchant. This registration and classification was made

under authority of section 6 of the act of May 5, 1892, as amended by the act of November 3, 1893 (28 Stats., 7), which, after providing for the registration of Chinese laborers, contains this provision :

“That any Chinese person, other than a Chinese laborer, having a right to be and remain in the United States, desiring such certificate as evidence of such right, may apply for and receive the same without charge.”

Acting upon the faith of this classification, regularly made by your Department under the law as then understood, and his right as a duly registered merchant to depart from and reenter the United States Young Tai left the United States for a visit to China. Returning to the United States, he is confronted with a change in the ruling of your Department, which, if applied to him, prohibits his admission.

The question you submit is whether you have authority to permit his admission under the circumstances.

Under the treaty of 1894 between this country and China, a Chinese laborer, who has a lawful wife, child or parent in the United States, or property here of the value of \$1,000, by registering as a laborer within a specified time and complying with certain conditions, may leave the country and return to it again. It is claimed that Young Tai could have complied with the law relating to laborers, and would have done so had the Department not held him to be a merchant.

The sundry civil appropriation act of August 18, 1894 (28 Stats., 390), contains the following provision:

“In every case where an alien is excluded from admission into the United States under any law or treaty now existing or hereafter made, the decision of the appropriate immigration or customs officer, if adverse to the admission of such alien, shall be final unless reversed on appeal to the Secretary of the Treasury.”

I am of opinion that the authority thus vested in the Secretary of the Treasury to determine finally and conclusively whether or not a Chinese person shall be admitted into this country may be exercised in this and similar cases so as to keep faith and do no injustice.

Having regularly classified Young Tai as a merchant before he left this country with the view of returning, your Department can not in fairness refuse to recognize him as such when he returns and asks for admission upon the strength of your own certificate, duly issued to him as evidence of his right, under the statute, "to be and remain in the United States," and therefore to return to the United States.

For these reasons your question is answered in the affirmative.

Very respectfully,

JOHN K. RICHARDS,
Solicitor-General.

Approved.

JOHN W. GRIGGS.

The SECRETARY OF THE TREASURY.

PRIZE.

Certain tobacco belonging to the Portuguese vice-consul at Gibara, Cuba, was seized by the United States and condemned as prize, together with the Spanish vessel of which it formed the cargo. It was asserted that a claim for the tobacco was not directly and formally presented owing to certain correspondence between the Departments of State and Justice and the Portuguese minister. *Held*, that the precedents would have led to the condemnation of tobacco so owned, so shipped, so originating, and that its condemnation was not illegal and tortious, and that the demand of this merchant, whose status was not affected by his consular character, is without substantial merit.

Prize courts are, in a sense, governed by the law of nations relating to war.

DEPARTMENT OF JUSTICE,

February 10, 1899.

SIR: I have the honor to acknowledge the receipt of your letter of the 20th ultimo concerning certain tobacco belonging to Senhor da Silva Leal, Portuguese vice-consul at Gibara, Cuba, condemned as prize, together with the Spanish vessel *Domingo Aurelio*, of which it formed the cargo.

You inclose a copy of a communication from the minister of Portugal setting forth or intimating that a claim for the tobacco was not directly and formally presented by Senhor Leal in consequence of certain correspondence exchanged

between your Department, this Department, and the minister. It seems the minister was informed that "the United States attorney for the southern district of Florida had been directed to report the facts to the Department of Justice and to take such steps as might be proper for the return of the property to the claimant in view of the declarations made by the President of the United States." This is quoted from my letter to you and was by you communicated to the minister on October 4 last, prior to final action upon the prize, which was in December.

You subsequently wrote the minister—

"That Mr. Leal's claim was presented by an attorney at Key West on December 9 last, but on account of the fact that it was wholly informal and did not comply with the rules of practice, it was not considered; and that, as shown by the letter of his attorney, Mr. Leal knew of the seizure of said vessel long before the final decree of distribution was made, and yet no steps were ever taken by him to get his claim presented to the court. A final decree of distribution was made on December 14, and the money has been deposited in the Treasury of the United States."

The minister says:

"Mr. Silva Leal, who, residing in Gibara, Cuba, could not be expected to be familiar with the technicalities of American law, applied to me as soon as communications were reestablished between the United States and Cuba, and I presented his claim to the Department of State in my note of last September the 26th, which, as I was informed by your excellency's note of October 4 was communicated to the Attorney-General.

* * * * *

"Of course, if, after the claim was presented by His Majesty's legation on September 26, any suggestion had been made to me about the private presentation of the claim by an attorney to the court, I should have communicated in time with the claimant for him to comply with all the legal formalities."

You ask whether there is an equitable claim against this Government for an indemnity for the condemnation and sale of the tobacco.

Prize courts are, in a sense, courts governed by the law of nations relating to war. They exist in all countries, and in all must have some, if not the same, rules concerning the manner of presenting claims. It is not contended that any improper restrictions upon such presentation exist in our courts, and it would be going far to say that ignorance of them could be allowed to excuse compliance.

This would not, perhaps, relieve our Government of an equitable liability if this Department or yours, by its chief officers, formally represented to the minister that under our practice the claim could be and would be attended to by the attorney for the United States without anything to be done by the claimant, and the claimant, relying upon that assurance, lost his property in consequence.

But not only is it questionable that such was the fair import of the communication to the minister, but I have procured information which leads me to believe that the loss to the claimant was not so caused, but would have resulted with no matter what formality the claim had been presented. In other words, his property was liable to condemnation as prize under the law, and I do not find anything in the President's proclamations to exempt it.

From the depositions in preparatorio, evidently referring to Señor Silva Leal, who signs his name, in a letter now before me, "Manuel da Silva," I quote:

"I was born in the province of Lucca, Spain. For the last seven years I have lived in Gibara, Cuba. I am a Spanish subject. We were captured in front of Sagua on the 17th of July at 11 a. m. I do not know why we were captured. We were brought to the port of Key West. She was a Spanish boat but had no flag. The name of the captain of the ship is Francisco Garcia. I have know him for three years. A gentleman from Barracoa gave him possession of the vessel. I do not know his name. He took possession of the vessel at Barracoa. I do not know the name of the person who gave him possession. The captain lived at Sagua. He is a Spanish subject. We sailed from Gibara to Sagua, but were captured before we got there. We left Sagua about 4 a. m., on the 17th of July. We had 24 bales of tobacco on board at the time the vessel was captured. It

was put on board two or three days before leaving port. The cargo consisted of 24 bales of tobacco and 2 boxes of merchandise. I do not know the names of the owners (meaning the vessel's). They are Spaniards and are from Barracoa. They are Spanish subjects. The cargo was loaded at one port, Bocca de Sagua. The owner of the tobacco was Manuel Vasilva. The same person owns the whole cargo. He is a Portuguese. He lived and carried on business at Gibara. He has lived there for forty years. He resided before at Barcelona, Madrid, and New York. The goods were consigned to Manuel Vasilva. I am clerk for the shippers. I bought the tobacco from Guillermo, Hildage & Co. I paid for it. I have no receipt. I do not remember now what I paid for it. I have lost the receipt. The goods were to be delivered at Gibara for the account, risk, or benefit of Manuel Vasilva. I had no interest in the goods. The consignee was the owner of the goods. I know he had an interest in the goods because he ordered me to buy, and that is enough for them to take an interest in it. If the cargo was restored it would belong to the owner and nobody else. The only contract was to pay \$1 freight for each bale. This contract was made between the captain of the ship and Manuel Vasilva. It was made at Gibara the day before we left. The only papers on board of the ship at the time of the capture were the bills of lading of the tobacco and the roll of the vessel. There were no papers torn, burned, thrown overboard, destroyed, concealed, or attempted to be concealed. When I was captured the papers were taken off the ship, and there was a heavy sea, and on account of that some of them got wet and destroyed. This is the only way they were destroyed. I had the papers in a kind of a blouse and they got wet and spoiled and I threw them overboard. Some of the marines of the prize crew were present when I threw them overboard. The cargo was taken on board from the wharf at Bocca de Sagua on the 15th of July. There were no passengers on board but myself. I am a clerk of Manuel Vasilva and am a Spaniard. I am a seller and buyer for the house of Manuel Vasilva. I got on board at Gibara on the 5th of July. I went to Sagua to purchase tobacco.

* * * * *

"My name is Francisco Garcia. I was born in the Balearic Islands. I have lived for the last thirty years in Cuba. That is my present home—at Sagua de Namo. I am a Spanish subject. I was present at the seizing and taking of the ship. We had the usual coasting papers. It was a coasting vessel. We were seized about 3 miles from Sagua de Namo, on the 17th of July. We were seized on account of the war with Spain and were sailing under the Spanish flag. We were taken to the port of Banes and from there to Key West. I was the master of the vessel. I have the vessel chartered and have had it since before the war. I took possession at Baracoa, Cuba. It was delivered to me by Engnago Ortiz. He lives at Baracoa. We were carrying tobacco and a box of merchandise, and another box, which was opened here, consisting of butter. This was the cargo that we had on board at the time we were seized. It was put on board two days before leaving port. We had 44 bales of tobacco on board. The prize master broke open the box of merchandise and butter, but nothing was taken out of either box. The owner (of the vessel) was Engnago Ortiz. I know he is the owner, because he has always represented the ship. I don't know whether he is a Spaniard or Cuban. I think he is a Spaniard by birth. He lives at Baracoa. The cargo was put on board at two places—at El Canal and at Sagua de Namo. Twenty-three bales were put on board at El Canal and the balance at Sagua. The cargo was consigned to Manuel Vasilva, Portuguese consul at Gibara. He is from Portugal. He has lived at Gibara many years. I do not know where he lived previously. The goods were to be delivered at Gibara."

As I am convinced that the precedents would have led to the condemnation of tobacco so owned, so shipped, so originating, and that its condemnation was not illegal and tortious, I am of opinion that the demand of this merchant of Gibara, whose status was not affected by his consular character, is without substantial merit.

Respectfully,

JOHN. W. GRIGGS.

The SECRETARY OF STATE.

NAVIGABLE WATERS.

The War Department having given its consent and approval to the dredging of a canal which is wholly within the State of Texas, there is no reason why such permission should be withdrawn.

Clause 2 of the proviso to section 7 of the act of July 13, 1892, does not limit the authority of the Secretary of War to grant permission for the construction of a work of this character to navigable waters which lie wholly within the limits of one State.

The Secretary of War would not be prohibited from approving the plan and location of a bridge across boundary waters if acts of authorization were passed by the legislatures of the States interested.

The words "or other works" in this act are not to be interpreted according to their natural and usual sense, but are restricted to things of the same kind as those just enumerated.

Under the power conferred upon Congress by the Constitution to regulate commerce, the United States has the right to control all structures and works which interfere in any manner with the navigable capacity of the navigable waters of the United States which, either by themselves or in connection with other waters, form channels for interstate commerce.

Canals being artificial waterways or means of commercial transportation, as well as natural lakes and rivers, the same principles may be applied to them that are applied to bridges, turnpikes, streets, and railroads.

DEPARTMENT OF JUSTICE,

February 10, 1899.

SIR: I have the honor to acknowledge receipt of your communication of January 23, 1899, requesting my opinion upon a question which has arisen in your Department respecting the construction of a ship canal by the Port Arthur Channel and Dock Company between Sabine Lake and a point near the head of the bayou at the terminus of the Kansas City, Pittsburg and Gulf Railroad, in the State of Texas.

The facts stated in your letter are that, without any authority or consent from the Secretary of War, the Port Arthur Company originally attempted to dredge a channel through Sabine Lake, but was stopped and further work forbidden by the War Department; that subsequently permission was given by that Department to the company to dredge a channel between Sabine Lake and the terminus of the above-mentioned railroad, provided it was constructed

outside the limits of the lake. Subsequently further objection was made, on behalf of another corporation, that the Secretary of War had no legal right to grant permission for the dredging of such a channel under any conditions, because, as a matter of fact, Sabine Lake and Sabine Pass (being the body of water connecting Sabine Lake with the Gulf of Mexico) constitute the boundary line between the States of Texas and Louisiana. This objection was not made nor suggested at the time the original permission to the Port Arthur Company was granted.

The question submitted for my decision is, whether the fact that Sabine Lake and Sabine Pass constitute the boundary line between two States deprives the Secretary of War of jurisdiction and authority to grant permission for the construction of a public work which will affect the capacity of the port, roadstead, haven, harbor, or the channel of the navigable waters of Sabine Lake and Sabine Pass, and whether, on that account, orders should be given for the stoppage of the work now being prosecuted by the Port Arthur Company.

Under date of April 24, 1897, you requested the opinion of the Attorney-General as to whether the Secretary of War had authority to permit the construction of this canal, and by an opinion dated May 11, 1897, you were advised by the Solicitor-General that, without assuming to decide whether or not a canal is one of the works provided for in section 7 of the act of July 13, 1892 (27 Stats., 88), he was of the opinion that if it is such a work the Secretary of War has authority, under that section, to authorize and permit its construction. The question now submitted arises under the last clause of the proviso of the aforesaid section. It has been the subject of consideration by the Attorney-General in several instances. This section originally formed a part of the river and harbor act of 1890. (26 Stats., 454) 20 Op., 101; Id., 479; Id., 488; 21 Op., 41; Id., 531; Opinion of March 21, 1898.

The section consists of three distinct affirmative clauses, followed by a proviso in the nature of a limitation, which embraces two separate clauses. For convenience of consid-

eration and analysis, the section may be quoted in the following form:

“(a) That it shall not be lawful to build any wharf, pier, dolphin, boom, dam, weir, breakwater, bulkhead, jetty, or structure of any kind outside established harbor lines, or in any navigable waters of the United States where no harbor lines are or may be established, without the permission of the Secretary of War, in any port, roadstead, haven, harbor, navigable river, or other waters of the United States, in such manner as shall obstruct or impair navigation, commerce, or anchorage of said waters;

“(b) And it shall not be lawful hereafter to commence the construction of any bridge, bridge draw, bridge piers and abutments, causeway, or other works over or in any port, road, roadstead, haven, harbor, navigable river, or navigable waters of the United States, under any act of the legislative assembly of any State, until the location and plan of such bridge or other works have been submitted to and approved by the Secretary of War;

“(c) Or to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of any port, roadstead, haven, harbor, harbor of refuge or inclosure, within the limits of any breakwater or of the channel of any navigable water of the United States, unless approved and authorized by the Secretary of War:

“*Provided*, (1) That this section shall not apply to any bridge, bridge draw, bridge piers and abutments the construction of which has been heretofore duly authorized by law;

“(2) Or be so construed as to authorize the construction of any bridge, drawbridge, bridge piers and abutments, or other works, under an act of the legislature of any State, over or in any stream, port, roadstead, haven, or harbor, or other navigable water not wholly within the limits of such State.”

Certain parties interested in the navigation of Sabine Lake and Sabine Pass now object to the further prosecution of the construction of this channel by the Port Arthur Company upon the ground that it affects waters which are not wholly within the limits of one State, and contend that

clause 2 of the proviso limits the authority of the Secretary of War to grant permission for the construction of a work of this character to navigable waters which lie wholly within the limits of one State.

I think an analysis of the section, and especially of the proviso, fails to sustain this objection.

A consideration of the reasons which prompted Congress to enact the legislation now under discussion will tend to elucidate the meaning of the act, and the particular application of the various clauses in the proviso.

Under the power conferred upon Congress by the Constitution to regulate commerce, the United States possesses, provided Congress sees fit to exercise it, the right to control all structures and works which interfere in any manner with the navigable capacity of navigable waters of the United States, which, either by themselves or in connection with other waters, form channels for interstate commerce. In the absence, however, of legislation by Congress forbidding the States to authorize works of that nature, the States have very frequently, by legislative acts, granted rights to corporations and others to bridge navigable streams, to erect dams, booms, wharves, piers, and other works, which practically interfered with or abridged the navigability of streams over which Congress had the right to exercise jurisdiction. In the absence of Congressional legislation the Federal power, in the language of the courts, is dormant, but capable of assertion by Congress at any time; and when so asserted the power of Congress is supreme, and its laws, if in conflict with State laws upon the same subject, are paramount. (*Wilson v. Blackbird Creek Marsh Company*, 2 Peters, 245.)

The authority of Congress and of the several States in their respective spheres with relation to this subject is well summarized in the opinion of the United States Supreme Court in the case of *Gilman v. Philadelphia* (3 Wall., 713).

“The power to regulate commerce comprehends the control for that purpose, and to the extent necessary, of all the navigable waters of the United States which are accessible from a State other than those on which they lie; and includes, necessarily, the power to keep them open and free

from any obstruction to their navigation, interposed by the States or otherwise. And it is for Congress to determine when its full power shall be brought into activity, and as to the regulations and sanctions which shall be provided.

"This power, however, covering as it does a wide field, and embracing a great variety of subjects, some of the subjects will call for uniform rules and national legislation, while others can be best regulated by rules and provisions suggested by the varying circumstances of differing places, and limited in their operation to such places respectively. And to the extent required by these last cases, the power to regulate commerce may be exercised by the States.

"To explain. Bridges, turnpikes, streets, and railroads are means of commercial transportation as well as navigable waters, and the commerce which passes over a bridge may be much greater than that which will ever be transported on the water which it obstructs. Accordingly, in a question whether a bridge may be erected over one of its own tidal and navigable streams, it is for the municipal power to weigh and balance against each other the considerations which belong to the subject—the obstruction of navigation on the one hand, and the advantage to commerce on the other—and to decide which shall be preferred, and how far one shall be made subservient to the other. And if such erection be authorized in good faith, not covertly and for an unconstitutional purpose, the Federal courts are not bound to enjoin it.

"However, Congress may interpose whenever it shall be deemed necessary, by either general or special laws. It may regulate all bridges over navigable waters, remove offending bridges, and punish those who shall thereafter erect them. Within the sphere of their authority, both the legislative and judicial power are supreme."

Canals being artificial waterways, are likewise means of commercial transportation, as well as natural lakes and rivers, and the same principles may be applied to them that are applied to bridges, turnpikes, streets, and railroads. The construction of such artificial waterways has frequently been authorized by State legislation. In this instance, the Port Arthur Channel and Dock Company is a corporation of the State of Texas, organized under a general act of that State,

and authorized "to construct, own and operate its channels so far into the waters of the Gulf of Mexico as may be necessary to obtain an adequate depth of water at its gulf entrance to facilitate the ingress and egress of such vessels as may navigate the same, in so far as this State (Texas) may have the power to grant such right, which shall be in subordination to that of the Government of the United States in so far as that Government has the constitutional power to control the same."

Congress has frequently, by special acts, given its assent to the construction of bridges over navigable streams. In the case of *Willamette Iron Bridge Co. v. Hatch* (125 U. S., 1), Mr. Justice Bradley gives the following explanation of this practice. He says:

"Until Congress acts, the States have the plenary power to authorize the erection of bridges over navigable waters of the State, but when Congress chooses to act, it is not concluded by anything that the States, or that individuals by its authority or acquiescence, have done, from assuming entire control of the matter, and abating any erections that may have been made, and preventing any others from being made, except in conformity with such regulations as it may impose. It is for this reason, namely, the ultimate (though yet unexercised) power of Congress over the whole subject-matter, that the consent of Congress is so frequently asked to the erection of bridges over navigable streams. It might itself give original authority for the erection of such bridges when called for by the demands of interstate commerce by land, but, in many, perhaps the majority of cases, its assent only is asked, and the primary authority is sought at the hands of the State."

It appears to me that the second paragraph of the section and both paragraphs of the proviso had in view this condition of the law and this practice with reference to the subject of bridges and similar structures over navigable waters. It was not, in my judgment, intended by this act that plenary power should be conferred upon the Secretary of War to authorize the construction of bridges and similar works over navigable waters of the United States, but to substitute a new method by which the assent of the United States

should be required in all future cases, but without the necessity of a special act of Congress in each case. It will be observed that the particular classes of structures enumerated in the second clause of the section and in both the clauses of the proviso are substantially the same, namely, bridges, bridge draws, bridge piers and abutments. The second clause of the section and the second clause of the proviso have the additional phrase "or other works." But under a well settled practice of statutory interpretation, these words are not to be used according to their natural and usual sense, but are restricted to things of the same kind as those just enumerated. (Sutherland on Statutory Construction, 279.)

If, for the purpose of abbreviation, therefore, we substitute the word "bridge" for the different kind of structures designated in these clauses, the second subdivision of the section will, in effect, provide that hereafter it shall be unlawful to commence the construction of any bridge over navigable waters of the United States, under the authority of an act of the legislature of a State, until the location and plans of the bridges have been submitted to and approved by the Secretary of War. This subdivision would cover all instances where bridges had been authorized by State legislation enacted prior to the passage of this act, as well as bridges authorized by subsequent legislation, the prohibition being that the construction shall not be commenced until the Secretary shall have approved the plan and location of the bridge.

It was no doubt within the contemplation of Congress, however, that many bridges might have been authorized by previous legislation, duly and properly passed, and which it might be unjust to interfere with, even though the work of construction had not begun. To modify such seeming injustice, the first paragraph of the proviso was inserted, to the effect that the section should not apply to any bridge the construction of which had been *theretofore duly authorized by law*. Whether the words "duly authorized by law" are to be construed to mean bridges authorized by State legislation, without Congressional assent, or bridges fully authorized by State legislation and Federal approval, is a

question which it is not necessary to decide at present. Divergent views are held by learned counsel on this point.

It may have been anticipated by Congress that a contention might arise on this point, and, therefore, to guard against any interpretation of the act which would extend the legislation of one State so as to permit the construction of a bridge across a stream not wholly within the limits of such State, an interpretation or contention which might possibly be made if the section were permitted to stand without further proviso, the second clause of the proviso was inserted as a precautionary measure. This was not a limitation upon the authority of the Secretary of War, but a limitation upon the interpretation of the act. The proviso does not say that this section shall not be so construed as to authorize the Secretary of War to authorize the construction of any bridge, but it reads, "this section shall not be so construed as to authorize the construction of any bridge," etc. The obvious purpose was to prevent the construction of bridges over such waters as were boundary waters, upon the mere authority of one of the riparian States. If the proper acts of authorization were passed by the legislatures of both States, I do not think the Secretary of War would be prohibited from approving the plan and location of a bridge across boundary waters.

But the canal or channel now being constructed by the Port Arthur Company is not in any sense such a work or structure as is contemplated in this proviso. If it is a work over which the Secretary of War, by virtue of this section, has any jurisdiction, it is one that comes under the third subdivision of the section—an excavation which affects the condition or capacity of the channel of Sabine Lake and Sabine Pass. But in this paragraph there is no reference whatever to any State authority, and, of course, there can be no limitation except such as is expressed in the act itself. The War Department having, under the previous opinion of Solicitor-General Conrad, given its assent and approval to the dredging of this canal, which is wholly within the territory of the State of Texas, I see no reason why that permission should now be withdrawn. If the particular work which the Port Arthur Company is

prosecuting is one not covered by this section, then the approval and authority of the Secretary of War were not necessary. If it was such a work as required his authority and approval, then it was properly given, and the company having prosecuted its work in good faith under that authority and expended large sums of money, it ought not now to have the authority revoked.

Very respectfully,

JOHN W. GRIGGS.

The SECRETARY OF WAR.

CHINESE—APPEALS.

An appeal by a Chinese person, taken under section 13 of the act of September 13, 1888, to a judge of a district court, from the judgment of the commissioner, does not vacate, but merely suspends the judgment of the commissioner and proceedings thereunder until the appeal is dismissed.

In case of an appeal to a higher tribunal for review, the original judgment stands in suspense until the appellate court, by a judgment of its own, shall supersede it.

DEPARTMENT OF JUSTICE,

February 11, 1899.

SIR: I have the honor to acknowledge the receipt of your letter asking my opinion upon the "question, left undetermined by the Comptroller" in passing upon an account of a collector of customs, involving the maintenance of a Chinaman ordered by a United States commissioner to be deported, viz, whether the appeal of the Chinaman to the district court in such cases has the effect of vacating the order or simply suspends it.

The statute under which this question arises is a part of section 13 of the act to prohibit the coming of Chinese laborers to the United States, approved September 13, 1888 (25 Stats., 479):

"Any Chinese person, or person of Chinese descent, found unlawfully in the United States or its Territories may be arrested upon a warrant issued upon a complaint, under oath, filed by any party on behalf of the United States, by any justice, judge, or commissioner of any United States

court, returnable before any justice, judge, or commissioner of a United States court, or before any United States court, and when convicted, upon a hearing, and found and adjudged to be one not lawfully entitled to be or remain in the United States, such person shall be removed from the United States to the country whence he came. But any such Chinese person convicted before a commissioner of a United States court may, within ten days from such conviction, appeal to the judge of the district court for the district. A certified copy of the judgment shall be the process upon which said removal shall be made, and it may be executed by the marshal of the district or any officer having authority of a marshal under the provisions of this section."

I think the most proper and sensible view is that an appeal by a Chinese person taken under this provision of law to a judge of a district court from the judgment of a commissioner does not vacate, but merely suspends, the judgment of the commissioner and proceedings thereunder until the appeal is dismissed, in which case the judgment of the commissioner will be revived, or until the district judge, having heard the case *de novo*, gives a new judgment. In the latter case the judgment of the court would supersede the judgment of the commissioner.

I am aware that in some State jurisdictions it is held that an appeal from the judgment of an inferior court, where the statute authorizes a trial *de novo* by the appellate court, vacates the original judgment. Such view, however, is artificial and in practice is illogical, and in most States where it is upheld depends either upon the special provisions of the local statutes or upon a long-standing course of judicial practice. The ordinary conception of the force and effect of an appeal in judicial proceedings is that the matter is taken to a higher tribunal for review, the original judgment standing in suspense until the appellate court, by a judgment of its own, shall supersede it. (2 Daniell's Chancery Pleadings and Practice, 1467; *Lum v. Price*, 1 Harr (N. J.), 195.) It seems to be entirely logical, and I perceive no inconvenience that can follow from the adoption of such a construction in this instance.

You are therefore advised that the effect of an appeal

in such a case as you have stated is to suspend, and not to vacate, the judgment of the commissioner.

Very respectfully,

JOHN W. GRIGGS.

The SECRETARY OF THE TREASURY.

OPINIONS.

The Attorney-General will not exercise appellate jurisdiction over a decision of one of the Executive Departments upon mixed questions of law and fact.

In a request for an opinion the facts must be definitely formulated and clearly stated by the person asking the opinion. The Attorney-General can not be required to extract a finding of facts from correspondence or reports.

DEPARTMENT OF JUSTICE,

February 14, 1899.

SIR: By a letter addressed to me on the 7th of January, 1899, relative to the application of George W. Harbaugh for removal, under the act of Congress of March 2, 1889, of three charges of desertion standing against him on the rolls, you requested my opinion and advice with reference to the case, to which I replied on January 10, 1899, that I was unable to gather from the papers submitted to me what facts are to be taken by me as established and what questions of law you find difficulty in resolving. I am now in receipt of your letter of January 16, wherein you say that the report of the Acting Judge-Advocate-General of the Army of March 17, 1891, is relied upon by your Department as setting forth the essential facts in the case, and that the questions of law discussed in that opinion are those which it is desired to have resolved. In other words, it is desired to know whether the conclusions of law reached by the Acting Judge-Advocate-General are correct, and justified by the facts upon which he based them.

An examination of the report of the Acting Judge-Advocate-General discloses numerous facts taken by him to be true, and certain inferences drawn from the records and proofs in the case, and a conclusion, which is in the nature of a mixed conclusion of law and fact, upon the whole sub-

ject. No specific statement of the facts which you consider to be established is made to me, nor are any specific questions of law stated for my consideration and advice. You practically ask me to exercise appellate jurisdiction over a decision made in your Department upon mixed questions of law and fact. This, by the well-established practice of this Department, which practice is based upon the statutes governing it, I am unable to do. When an opinion is requested of the Department of Justice on behalf of the head of another executive department, the facts must be definitely formulated and clearly stated by the person asking the opinion. The Attorney-General can not be required to extract a finding of facts from correspondence or reports. (20 Opin., 614, 640, 699, 711, 740, 742; 21 Opin., 36, 179, 202, 220.)

I regret, therefore, that I can not properly comply with your request.

Very respectfully,

JOHN W. GRIGGS.

The SECRETARY OF WAR.

NAVIGABLE WATERS—BRIDGES.

Congress has power to improve the navigation of the Ohio River, and for that purpose may actually take such property as is requisite, and may cause the abatement and prostration of all structures which, in its judgment, interfere with its plan of improvement.

Structures which are unauthorized by law may be summarily removed and without compensation. Those which are authorized by law can only be removed upon making just compensation, unless the authorization by the Federal Government was accompanied with a reservation of a right to change, modify, or remove.

The act of September 19, 1890, is not sufficient to warrant the Secretary of War in requiring changes to be made in the bridge of the Baltimore and Ohio Railroad Company over the Ohio River at the expense of the owner without compensation, as this act applies only to such bridges as are constructed under the authority of an act of Congress which expressly reserved to Congress the right to require changes or modifications in the structure.

If the company itself voluntarily prostrates its bridge, with the intention of constructing another in its place, the Secretary of War has the right to prescribe conditions as to height, length of span, etc.

DEPARTMENT OF JUSTICE,

February 14, 1899.

SIR: I have the honor to acknowledge receipt of your communication of February 2, 1899, requesting my opinion on certain questions relative to the bridge of the Baltimore and Ohio Railroad Company across the Ohio River at Bellaire, Ohio. It will be convenient, for the purpose of stating the facts involved and the questions to be answered, to quote your letter entire:

“The bridge of the Baltimore and Ohio Railroad Company across the Ohio River at Bellaire, Ohio, was built under authority of an act of Congress, approved July 14, 1862, entitled ‘An act to establish certain post roads’ (12 Stat. L., 569), one of the provisions of which is that the span of any bridge erected under its authority, covering the main channel of the river, shall not be less than 300 feet in length. The bridge in question has a channel span of 322 feet in the clear, and while complying with the requirements of the said act, and probably affording proper and sufficient facilities for navigation at the time it was built—nearly thirty years ago—is considered by the Engineer Department to be manifestly inadequate for the river commerce of the present day. The said act of July 14, 1862, was superseded by act of December 17, 1872 (17 Stat. L., 398), and the act amendatory thereof, approved February 14, 1883 (22 Stat. L., 414), which acts require that every bridge thereafter erected across the Ohio River shall have a channel-span giving a clear waterway between the piers of 500 feet, measured on the low-water line. Owing to the enormous growth and development of commerce on said river, the War Department of late years has insisted that all bridges built over the river shall have spans of much greater length than is specified in the law, the length insisted upon ranging from 600 to 800 feet.

“This Department is informed that the Baltimore and Ohio Railroad Company intends to reconstruct the bridge first hereinbefore mentioned, using the old piers or new ones in the old places, to support new spans of the same length as those of the present bridge, thus perpetuating a bridge that is reported by the Engineer Department to be already

an unreasonable obstruction to the free navigation of said river.

"Inviting your attention to sections 4 and 5 of the river and harbor act of September 19, 1890 (26 Stat. L., 453), and section 3 of the river and harbor act of July 13, 1892 (27 Stat. L., 110), I have the honor to request your opinion on the following questions:

"First. Whether, having in view the authority under which said bridge was built, the Secretary of War has power under the law to prescribe how the bridge shall be constructed so as to render navigation through or under it reasonably free, easy, and unobstructed.

"Second. Whether, in case the company does not intend to construct the new bridge, the Secretary of War has power to serve notice on the company to make such changes in the bridge, specifying the changes, as he shall determine to be required to render navigation through or under it reasonably free, easy, and unobstructive, and take such further action prescribed in section 4 of the said act of September 19, 1890, as will render the company liable to the penalties prescribed in section 5 of the same act."

The act approved July 14, 1862, entitled "An act to establish certain post roads" (12 Stat., 569), contained general provisions as to bridging the Ohio above the mouth of the Big Sandy River. By section 3 of that act it is enacted that it shall be lawful for any other railroad company or companies whose line or lines of road may now or shall hereafter be built to the Ohio River above the mouth of the Big Sandy River, in accordance with the terms of the charter or charters of such company or companies, to build a bridge across said river.

The act contains specific directions as to how such bridge should be built, the height of the span, whether built as a drawbridge or with unbroken and continuous spans. The bridge in question was constructed in accordance with the assent of Congress, as expressed in that act, and in compliance with the terms and conditions thereof. In this act there was no reservation by Congress of the right to alter, amend, or repeal the act, or of any power to compel a company constructing a bridge in accordance with the terms

thereof to alter or modify the structure as the demands of navigation or the judgment of Congress might subsequently require.

The act of December 17, 1872, relating to bridges thereafter to be constructed, superseded the act of 1862, and did contain a reservation of the right to alter or amend, so as to prevent or remove all material obstructions to the navigation of the river by the future construction of bridges, without any liability of the Government for damages on account of such alteration or amendment, and also contained a reservation of the right to direct changes to be made in the plan of construction of any bridge constructed under that act during the progress of the work, at the cost and expense of the owners thereof.

In the case of *Bridge Company v. United States* (105 U.S., 470) it was held by the Supreme Court that such a reservation of power to alter or amend, contained in an act authorizing the construction of a bridge across the Ohio at Cincinnati, was a condition attached to the grant, and that the company by accepting the grant became subject to that limitation and reservation, and that Congress, by requiring changes and modifications in the bridge which the company was authorized to construct, incurred no liability to make compensation to the bridge company. This decision was rested entirely upon the fact that the right to require such alterations and modifications was expressly reserved in the act. It seems quite clear, in view of the principle of that decision and upon ordinary principles of justice, that in the absence of such a reservation a subsequent requirement by Congress that the company should change or modify its plan, whereby additional cost and expense are imposed upon it, would be essentially a taking of private property for public use without just compensation, a thing which under the Constitution could not be done. As was said by Mr. Justice Field in his dissenting opinion in the case of *Bridge Company v. United States* (*supra*):

“There is a general principle of justice pervading our laws and the laws of all free governments which requires that whoever unlawfully and wrongfully imposes upon another the necessity of an unusual expenditure of money

or labor or materials for the protection and preservation of his property shall make complete indemnity for the expenditure. The principle applies as fully to the acts of the government as to those of individuals."

The present bridge at Bellaire is a lawful structure under the act of 1862. Unquestionably Congress has power to improve the navigation of the Ohio River, and for that purpose may actually take such property as may be requisite, and may cause the abatement and prostration of all structures which, in its judgment, interfere with its plan of improvement. Structures which are unauthorized by law may be summarily removed and without compensation. Structures which are authorized by law can only be removed upon making just compensation to the owner, unless the authorization by the Federal Government was accompanied with a reservation of a right to change, modify, or remove, as is provided in the act of 1872, and as was provided in the case of the *Newport and Cincinnati Bridge Company* (105 U. S.).

Section 4 of the river and harbor act of September 19, 1890 (26 Stats., 453), confers upon the Secretary of War authority, whenever he has good reason to believe that any bridge now constructed or which may be hereafter constructed over any of the navigable waterways of the United States is an unreasonable obstruction to the free navigation of such waters, to require the persons owning or controlling such bridge so to alter the same as to render navigation through or under it reasonably free, easy, or unobstructed, in accordance with such specifications of changes as the Secretary shall determine.

In my judgment, as applied to this particular bridge, this authority would not be sufficient to warrant the Secretary of War in requiring changes to be made in this bridge at the expense of the owner without compensation. The act of 1890 must be construed to apply only to such bridges as are constructed under the authority of an act of Congress, either the act of 1872 or under a special act, which expressly reserved to Congress the right to require changes or modifications in the structure.

But if the company itself voluntarily prostrates its own

bridge and proposes to construct another one in place thereof, then the conditions would be changed materially. As was said by Chief Justice Waite in *Bridge Company v. United States* (*supra*):

“Congress, which alone exercises the legislative power of the Government, is the constitutional protector of foreign and interstate commerce. Its supervision of this subject is continuing in its nature, and all grants of special privileges affecting so important a branch of governmental power ought certainly to be strictly construed. Nothing will be presumed to have been surrendered unless it was manifestly so intended. Every doubt should be resolved in favor of the Government.”

The act of 1862 authorized the construction of a bridge. It continued in operation until superseded by the act of 1872, and all things done under it prior to the passage of the act of 1872 became and were, if within the terms of the act, authorized and lawful. The bridge now existing was built under that act, and is a lawful structure. But the act does not confer authority to build any other or any different bridge from the one which the company did build. If it constructs a bridge hereafter, even though it may be in the same location as the present one, it will not be under the authority of the act of 1862, but under the authority of the act of 1872 and subsequent legislation, under which the Secretary of War has the right to prescribe certain conditions as to height, length of span, etc., and the company would have no right to resort to the authority originally granted by the act of 1862. It maintains its present bridge under the assent given by that act, but it can not erect and maintain another bridge under the authority of that act because it has been superseded and other provisions, conditions, and terms imposed by Congress in the interests of enlarged and improved navigation, which it would be unjust and unfair to the public to permit the company to disregard.

Very respectfully,

JOHN W. GRIGGS.

The SECRETARY OF WAR.

NAVIGATION LAWS—SHIPPING ARTICLES.

The scale of provisions prescribed by section 23 of the act of December 21, 1898, must be printed in the copy of shipping articles for coastwise steamers and posted.

DEPARTMENT OF JUSTICE,
February 18, 1899.

SIR: I have received from you the following request for an opinion:

"I have the honor to transmit herewith a copy of a letter dated the 10th instant from Messrs. C. H. Mallory & Co., general agents of the New York and Texas Steamship Company, inquiring whether the scale of provisions prescribed by section 23 of the act of December 21, 1898, must be printed in 'the copy of the shipping articles for coastwise steamers,' and be 'posted.'

"The act of February 18, 1895, provides that agreements made before United States shipping commissioners by the crews of American vessels in the coastwise trade or the trade between the United States and the Dominion of Canada or Newfoundland or the West Indies or Mexico, as authorized by section 2 of an act approved June 19, 1886, shall not include the sixth item of section 4511 of the Revised Statutes, which item provides that a scale of provisions which are to be furnished to each seaman shall be inserted in an agreement to be made with each seaman who shall be carried to sea as one of the crew of a vessel 'bound from a port in the United States to any foreign port,' with certain exceptions. The scale so furnished is set forth in section 4612, Revised Statutes. The insertion of such scale of provisions in coasting articles seemed to be prohibited by the act of February 18, cited above, and United States shipping commissioners were advised accordingly. The act of December 21, cited above, amends section 4612, Revised Statutes, by substituting a scale of provisions for the scale in the section, and providing that the substituted scale shall be inserted 'in every article of agreement.'

"The question seemed to be presented whether the act of December 21 changes the existing practice by requiring the insertion of the statutory scale of provisions in coasting arti-

cles, first, where the seamen are shipped before United States shipping commissioners, and second, where they are shipped otherwise than before United States shipping commissioners; or, in other words, whether the phrase 'every article of agreement' must be construed as embracing agreements other than such as are mentioned in section 4511 of the Revised Statutes.

"Messrs. Mallory & Co. were advised that the general provision in the act of December 21 did not repeal the more special provision of the act of February 18, 1895, forbidding the insertion of the scale in coasting articles; but as doubt seems to exist, it is considered proper to submit the case to you.

"I will thank you for your opinion regarding the matter."

The principle stated by you in writing to Mallory & Co. is an important one; but vessels engaged in the coastwise trade constitute a large part of our merchant marine; the changeful policy of Congress has more than once applied to them the requirement in question; and, from the standpoint of those formulating a law which, conforming to its title, "An act to amend the laws relating to American seamen, for the protection of such seamen, and to promote commerce," treats of our seamen generally, I do not think seamen engaged in the coastwise trade and their articles of agreement can be regarded as a special subject not intended to be affected by such a law. In fact, the law deals with such seamen repeatedly, which shows that they and their affairs were not beyond its scope.

Whether to apply to them all or any of the requirements of Revised Statutes, 4511, etc., and if so, whether as absolute requirements or mere voluntary acts seems to have occasioned Congress, from 1872, when they were enacted, to the present, no little trouble. It has been a subject of diverse laws, with which we may reasonably presume that Congress was, in December, 1898, familiar.

In the light of these general considerations the particular act in question should be examined.

Section 23 does not amend Revised Statutes, 4612, "so as to read as follows," which might leave it to apply only as it

did before, but amends it by changing its scale of provisions and then, as a new and distinct proposition, says: "The foregoing scale of provisions shall be inserted in *every* article of agreement and shall not be reduced by *any contract*, except as above"—except; that is, by substituting other items of food mentioned.

This language is very broad and sweeping and points to a sweeping or inclusive construction if, as is the case, the thing proposed to be included is one which we can reasonably suppose Congress would intend to include. As already said, Congress has more than once included it in similar acts.

But the concluding section of the act of 1898 is yet stronger proof of the intent. That section says:

"This act shall apply to *all* vessels not *herein specifically exempted*, but sections one, two, three, four, five, six, seven, eight, nine, ten, eleven, thirteen, fourteen, *twenty-three* (being the section referred to by you), and twenty-four, shall not apply *to fishing or whaling vessels or yachts*."

This seems but another way of saying that the language quoted from section 23 shall apply to coasting vessels. They are certainly not specifically exempted in the act, and are not fishing or whaling vessels or yachts.

Whatever the real thought of Congress may have been, it has taken the responsibility of whatever may be within its sweeping terms, and it is not for us to narrow what it sought to make broad.

I am of opinion, therefore, that your questions are to be answered in favor of the insertion of the scale of provisions.

Respectfully,

JOHN W. GRIGGS.

The SECRETARY OF THE TREASURY.

OPINIONS—CONFISCATED PROPERTY.

When an opinion is desired of the Attorney-General, the particular question of law on which his advice is desired should be specifically formulated, and the facts which exist or are assumed as the basis of such question should also be definitely stated.

The military government of the United States at Manila should return to certain claimants all property and possessions taken from them by the United States in pursuance of the order of General Otis of November 25, 1898.

DEPARTMENT OF JUSTICE,

February 21, 1899.

SIR: I am in receipt of your communication of the 20th instant referring to me a certain opinion of the Judge-Advocate-General relative to the claim of Mr. Doroteo Cortes and others for the return of certain property of which they claim to be the owners now in the possession or under the control of the military governor of the United States at Manila, together with certain papers relating to that subject, upon which you request my opinion on the question therein presented.

I take the liberty of pointing out to you that when an opinion is desired from the Attorney-General it is requisite that the particular questions of law as to which his advice is desired should be formulated specifically, and the facts which exist or are assumed as the basis of such questions should also be definitely stated. Waiving, however, for the purpose of this case, the informality of the request made by you, I have the honor to advise you that in my opinion the conclusion reached by the Judge-Advocate-General in his opinion is correct. Not intending to indorse in all respects the reasoning of the Judge-Advocate-General, it appears to me that from the facts taken by him in his opinion to be true, these claimants, so far as the military authorities of the United States are concerned, ought not to have been interfered with in the possession of their property which they had resumed after the abandonment of the Spanish officials. The military authorities of the United States were under no obligation to sustain or support arbitrary proceedings for confiscation of the property of Spanish subjects on the ground of disloyalty, and when proceedings taken for that purpose had resulted, either by abandonment or otherwise, in the original owners coming again into possession of their property, their right of possession was not open to question or inquiry on the part of this Government.

I think the military governor should be directed to return

to the claimants all of their property and possessions taken by the United States in pursuance of the order of General Otis which bears date of November 25, 1898.

Very respectfully,

JOHN W. GRIGGS.

Hon. GEORGE D. MEIKLEJOHN,
Assistant Secretary of War.

CHINESE—HAWAII.

The intent of the lawmaker is to be found in the language that he has used.

To immigrate is to come into a country of which one is not a native, and in which one has not acquired a residence or domicile.

Congress has power to exclude aliens altogether from the United States, or to prescribe the terms and conditions on which they may come into this country.

An alien who has resided in this country without becoming naturalized, and who departs with the intention of returning, is not to be deemed an immigrant upon his return, although he was an alien immigrant when he first entered the country.

The Secretary of the Treasury has authority to admit to the Hawaiian Islands such Chinese persons as departed therefrom under regulations of the existing government allowing them to return, as they are not excluded by the extension to the islands of the law and regulations now operative within the United States.

DEPARTMENT OF JUSTICE,

February 21, 1899.

SIR: The joint resolution providing for annexing the Hawaiian Islands to the United States was approved July 7, 1898, and proclaimed in the islands August 12, 1898.

This resolution, while providing that "the municipal legislation of the Hawaiian Islands, * * * not inconsistent with this joint resolution nor contrary to the Constitution of the United States nor to any existing treaty of the United States, shall remain in force until the Congress of the United States shall otherwise determine," and that "until Congress shall provide for the government of such islands all the civil, judicial, and military powers exercised by the officers of the existing government in said islands shall be vested in such person or persons and shall be exer-

cised in such manner as the President of the United States shall direct," contains the following paragraph:

"There shall be no further immigration of Chinese into the Hawaiian Islands, except upon such conditions as are now or may hereafter be allowed by the United States; and no Chinese, by reason of anything herein contained, shall be allowed to enter the United States from the Hawaiian Islands."

On October 21, 1898, in response to your inquiry of October 11, 1898, relative to the status of the Chinese in the Hawaiian Islands, I expressed the opinion that—

"The restrictions placed by our exclusion laws upon the admission of Chinese persons of the exempt classes, and the regulations made under the provisions of the treaty between the United States of registered Chinese laborers, are to be held applicable to Chinese persons applying for admission to the Hawaiian Islands, and to such persons residing there and who may wish to depart with the intention of returning."

Following this opinion, you directed Chinese Inspector J. K. Brown to proceed to the Hawaiian Islands and cooperate with the customs officers there in enforcing the treaty, laws, and regulations which govern the admission of Chinese into the United States.

After the arrival of Inspector Brown in the islands, the collector-general of customs of Honolulu, acting under his instructions and in cooperation with him, denied certain Chinese the right to land under permits issued by the former government of the islands. Some of these Chinese were residents of the islands before their annexation and had left them for a temporary purpose, *animo revertendi*, under the regulations then in force, and upon the faith of permits issued by the existing government entitling them to return to their business and their homes.

The denial to these Chinese of the right to land under permits issued by the former government was followed by the institution of proceedings in habeas corpus before Chief Justice Judd, of the supreme court of Hawaii, to test the legality of their exclusion. The chief justice held that the clause of the annexation resolution providing there shall be no further immigration of Chinese into the islands can not

be applied to Chinese seeking to enter the islands under permits duly issued by the former government without giving the resolution a retrospective operation and doing manifest injustice.

On appeal to the supreme court of Hawaii a majority of that court, consisting of Justice Whiting and Circuit Judge Perry (in place of Justice Frear), overruled Chief Justice Judd, and held (the chief justice dissenting) that the provision prohibiting further immigration applies to all Chinese seeking admission to the islands after their annexation to the United States, as well to those returning as to those coming to the islands for the first time.

In your communication of the 31st ultimo, after calling my attention to former letters advising me of the facts I have briefly recounted, you inform me that the Chinese minister has represented to your Department that the enforcement of our laws and regulations in the manner contemplated by Inspector Brown will cause great hardship to Chinese who, having resided in the Hawaiian Islands, departed therefrom under the regulations of the Hawaiian Government, and before the regulations of your Department were put into force and effect, and who now seek to return to those islands. You then state:

"It appears from a report dated the 13th instant, from Chinese Inspector Joshua K. Brown, stationed at Honolulu, that the several classes of Chinese persons who were entitled to enter the Hawaiian Islands under the Hawaiian law and regulations, but who have not yet sought admission thereto, are 2,526 in number, as will appear from the inclosed copy of the report referred to.

"Of this number, it appears from Inspector Brown's report that 1,888 are admissible under the existing regulations as natives or naturalized citizens of Hawaii, being other than aliens. Of the remaining 638, it may be presumed that those who are merchants can prove their right to admission under the provisions of section 2 of the act of November 3, 1893, and that those who are of the exempt classes named in Article III of the treaty with China may secure admission by the presentation of the certificates required by section 6 of the act of July 5, 1884."

In view of the foregoing, you request an opinion as to whether you have authority to admit to the Hawaiian Islands such Chinese persons as departed therefrom under the regulations of the existing government allowing them to return, but who would be excluded by the extension to the islands of the law and regulations now operative within the United States.

The power of Congress to exclude aliens altogether from the United States, or to prescribe the terms and conditions on which they may come into this country, is settled by the adjudication of our Supreme Court (*Chinese Exclusion Case*, 130 U. S., 581, 603; *Nishimura Ekiu*, 142 U. S., 651, 653, 659, 660; *Fong Yue Ting v. U. S.*, 149 U. S., 698, 713, 714; *Lem Moon Sing v. U. S.*, 158 U. S., 545, 547). The matter for consideration, therefore, is not the power of Congress, but its intention. Congress provided that the existing government of the Hawaiian Islands should continue and the municipal legislation not inconsistent with the Constitution or laws of the United States should remain in force. Congress then used this language, which requires construction:

“There shall be no further immigration of Chinese into the Hawaiian Islands, except upon such conditions as are now or may hereafter be allowed by the United States; and no Chinese, by reason of anything herein contained, shall be allowed to enter the United States from the Hawaiian Islands.”

It is to be observed that to provide there shall be “no further immigration” is to recognize there has been immigration; and to enact that “no Chinese, by reason of anything herein contained, shall be allowed to enter the United States from the Hawaiian Islands” is to concede that, under the Hawaiian law, Chinese whom our law would exclude obtained a domicile in the islands and are residing there now. In other words, Congress legislated in view of the fact that the immigration of Chinese into the Hawaiian Islands had proceeded on lines distinct from those which obtain in the United States. While the resolution provides that the islands shall be “annexed as a part of the territory of the United States,” it also provides that with respect to Chinese the islands are not to be deemed a part of the United States.

Under our law a Chinese person lawfully within one of the States or Territories may freely pass into any other State or Territory. The right to be and remain within the United States carries with it the right to pass into any part of the United States. With respect to Chinese domiciled in the Hawaiian Islands at the time of annexation a distinct provision is made. Their right to be and remain in the islands is not denied. The restriction is upon any "further" immigration. But while those rightfully in the islands at the time of annexation are recognized as entitled to remain there, there is an explicit provision denying their right on that account to come into the United States.

I call attention to these things for the purpose of pointing out that it was not the intention of Congress, by this clause, to extend the Chinese exclusion laws of this country in toto to the islands. Special provisions were made. No Chinese, by reason of the annexation, were to be allowed to enter the United States from the Hawaiian Islands; and "no further immigration of Chinese into the Hawaiian Islands" was permitted except upon conditions prescribed by the laws of the United States. What did Congress mean by "no further immigration"?

"The primary and general rule of statutory construction," said Mr. Justice Brewer, speaking for the court in *United States v. Goldenberg* (168 U. S., 95, 102), "is that the intent of the lawmaker is to be found in that language that he has used. He is presumed to know the meaning of words and the rules of grammar." The word "immigration" means the act of immigrating, and to immigrate is to come into a country of which one is not a native, and in which one has not acquired a residence or domicile. The act of immigration is accomplished when the foreigner seeking a new home first comes into the country. After he has gained a residence, with the rights incident thereto, a return to the country of his choice, following a temporary absence, is not regarded as a second act of immigration.

As illustrative of the fact that there is a clear distinction between coming into a country for the first time and returning to it after a temporary absence, a distinction based essentially upon rights acquired by domicile, I call particular

attention to the case of *Lau Ow Bie v. United States* (144 U. S., 47). In this case it was held that the provision in section 6 of the Chinese restriction act of May 6, 1882, as amended by the act of July 5, 1884, requiring every Chinese merchant coming into this country to procure and produce a certificate from the Chinese Government, did not apply to Chinese merchants already domiciled in the United States, who, having left the country for temporary purposes, *animo revertendi*, seek to reenter it on their return to their business and their homes.

Mr. Chief Justice Fuller, speaking for the court, said, page 61:

"The section by its terms declares that 'every Chinese person other than a laborer who may be entitled by said treaty or this act to come within the United States, shall obtain the permission of and be identified as so entitled by the Chinese Government, or of such other foreign government of which at the time such Chinese person shall be subject, the permission and identification in each case to be evidenced by the certificate described.

"But Chinese merchants domiciled in the United States, and in China only for temporary purposes, *animo revertendi*, do not appear to us to occupy the predicament of persons 'who shall be about to come to the United States,' when they start on their return to the country of their residence and business. The general terms should be limited to those persons to whom Congress manifestly intended to apply them, and they would evidently be those who are about to come to the United States for the first time, and therefore might properly be required to apply to their own Government for permission to do so, as also to so identify them as to distinguish them as belonging to the classes who could properly avail themselves of such leave.

"But by general international law, foreigners who have become domiciled in a country other than their own acquire rights and must discharge duties in many respects the same as possessed by and imposed upon the citizens of that country, and no restriction on the footing upon which such persons stand by reason of their domicile of choice, or commercial domicile, is to be presumed; while by our treaty

with China, Chinese merchants domiciled in the United States have, and are entitled to exercise, the right of free egress and ingress, and all other rights, privileges, and immunities enjoyed in this country by the citizens or subjects of the 'most favored nation.'"

This case recognizes that Chinese who become domiciled in this country acquire certain rights with which no unjust interference is to be presumed. A provision directed in terms to all Chinese about to come into the United States was therefore construed so as not to apply to Chinese returning to the United States, although in fact a person can not return to the United States without coming into this country. In other words, an alien resident is not an alien immigrant. Under our alien immigration acts it has been held that an alien who has resided in this country without becoming naturalized, and who departs with the intention of returning, is not to be deemed an immigrant upon his return, although he was an alien immigrant when he first entered the country. (51 F. R., 275; 63 F. R., 437.)

Applying this wholesome doctrine to the case submitted, the Chinese who, under the former Government of the Hawaiian Islands, became domiciled in the islands acquired certain rights, among which was the right to leave the islands for a temporary purpose and return. It is not to be presumed that Congress, which recognizes the right of such Chinese to be and remain in the islands, intended to interfere with the incidental right of returning to the islands after a temporary absence. Chinese laborers have been for years absolutely prohibited from coming into the United States, yet all the time we have permitted, and now permit, Chinese laborers lawfully within the United States to leave this country for a temporary purpose and return.

Accordingly, in view of the manifest injustice of interfering with a right incidental to lawful residence in the islands, the words "no further immigration" should be construed so as to apply only to actual additional immigration into the islands, namely, the coming of Chinese into the islands for the first time after annexation, and not to the return to the islands of Chinese who have a lawful residence there and are simply exercising the recognized right

of returning, after a temporary absence, to their business and their homes.

Your question is therefore answered in the affirmative.

Respectfully,

J. K. RICHARDS,
Solicitor-General.

Approved.

JOHN W. GRIGGS.

The SECRETARY OF THE TREASURY.

DUTY.

The Secretary of the Treasury has the power to permit the transfer and delivery to the steamship *Kaiser Wilhelm II* of a piece of machinery known as a "screw boss," brought into the harbor of New York by a sister ship for the purpose of replacing a defective piece in the former, without exacting the payment of duty.

DEPARTMENT OF JUSTICE,
February 24, 1899.

SIR: In your communication of the 14th instant you submit the question whether you have the power to permit a piece of machinery known as a "screw boss," brought into the harbor of New York by the *Friedrich der Grosse* for the purpose of replacing a defective piece in the steamship *Kaiser Wilhelm II*, of the same line, the North German Lloyd, to be transferred in that harbor, under proper safeguards, from the former to the latter vessel, without the payment of duty thereon.

It appears that the screw boss sought to be transferred is a duplicate piece of machinery, designed and made especially for the *Kaiser Wilhelm* and kept on hand at the home port (Bremen) for use in case of emergency. Duplicate pieces of the more important parts of the machinery of this vessel were manufactured at the time of the building of the engines and machinery and have been kept on hand since, so that in case of accident a broken or defective piece of machinery may be replaced without delay. The smaller pieces are carried on board the ship, but on account of its weight (6 tons) the screw boss was kept at Bremen until needed.

Under the circumstances stated I am disposed to regard this duplicate piece of machinery, not as an article imported from a foreign country and subject to duty under our customs law, but as a part of the equipment originally provided

for and belonging to the steamer *Kaiser Wilhelm*, which you may permit to be delivered to it by its sister ship without the payment of duty.

In the recent case of *The Conqueror* (166 U. S., 110) the Supreme Court held that a steam yacht built abroad and purchased by a citizen of this country was not subject to duty upon being brought into the port of New York. Respecting the character of this steam yacht the court, speaking by Mr. Justice Brown, said, page 115:

"She is not imported or taken into the country in the ordinary sense in which that term is used with reference to other articles, does not become commingled with the general mass of property, and is employed precisely as she might be legally employed by her foreign owners or by an American citizen leasing her from such owner. Other articles are dutiable, not because they have been purchased, but because they are actually imported and become the subject of sale and commerce within the country."

In support of its view that a vessel is not dutiable the court cited *United States v. A Chain Cable* (2. Sumn., 362) and *The Gertrude* (2 Ware, 181), involving the dutiability of parts of the equipment of a vessel and therefore peculiarly pertinent in considering the question submitted.

In *United States v. A Chain Cable* it was held that a chain cable which was purchased at Liverpool by the master of the ship *Marathon* to supply the place of a hempen cable which had become unseaworthy before the arrival of the ship at Liverpool became a part of the equipment of the ship and was exempt from duty, although after the ship had returned to Boston it was taken from the vessel and loaned for a temporary use in launching a ship at Medford. Although detached from the ship while thus being used, it retained its character as a part of the equipment of the ship and was therefore exempt from duty.

In *The Gertrude* it was held that the tackle, apparel, and furniture of a foreign vessel, wrecked upon our coast, and landed and sold separately from the hull, were not goods, wares, and merchandise imported into the United States within the meaning of the revenue laws. The case was put upon the ground that the rigging and apparel of the ship

are a part of the ship and therefore not merchandise in any other sense of the word than that in which the ship herself is. Judge Ware used the following language, which was approved by Mr. Justice Story on appeal to the circuit court (3 Story, 68, 71, 76):

“If we look through the whole of the numerous acts of Congress laying duties on merchandise imported, as well as those regulating the collection of the same, we shall find they uniformly contemplate the cargo; they refer to articles having the quality of merchandise in the ordinary and most popular sense of the word. They refer also to goods intended to be introduced into the country for sale and consumption. or for the general purpose of commerce.”

I understand it to be true that under the ruling of your department the racing rigging of a yacht, which can not be used in crossing the ocean, and is therefore brought back to this country on a steamer, is admitted free of duty, because it is treated as a part of the yacht itself.

If the *Kaiser Wilhelm* had itself brought the duplicate screw boss into the port of New York, the right to use it free of duty would hardly be questioned. The case is not materially changed by its being brought over in a sister ship and transferred in the harbor of New York without any landing in the ordinary sense. The duplicate screw boss, like the original, was made and delivered abroad to the steamship company for the *Kaiser Wilhelm*. It then became a part of the equipment of that ship, to be used when required. At present it is indispensable. It is not imported for sale or consumption here in the ordinary sense. It is brought over to relieve the disabled ship of a friendly nation, detained in one of our ports for repair.

Upon the whole, without further discussion, let me say I take the view you may permit the transfer and delivery to the *Kaiser Wilhelm* of this part of its equipment without exacting any duty.

Very respectfully,

JOHN K. RICHARDS,
Solicitor-General.

Approved.

JOHN W. GRIGGS.

The SECRETARY OF THE TREASURY.

LOST REGISTERED MAIL—STATUTORY CONSTRUCTION.

The registry provisions of the Postal Convention of Washington are not operative in or as to the United States, but its liability is only that imposed by the act of 1897 and the rules of the Post-Office Department made in pursuance thereof.

Until Congress shall otherwise provide with reference to indemnity for lost registered mail the Postmaster-General may either pay the limited indemnity on foreign matter, as provided in the act of 1897, irrespective of what other countries may do, or so amend the rules of the Department as to limit the indemnity to lost registered matter originating in and addressed to a place within the United States.

The actual intention of the framers or parties to a written document is generally to be determined by the meaning of the language used to express it.

Where language is doubtful, and it is fairly susceptible of different meanings, the consequence of a particular construction may be considered in determining which construction should be adopted, but where the language is plain, and when read in the light of existing facts and the object intended to be attained, it fairly admits of but one meaning, the consequences must be serious to warrant a departure from such plain meaning.

DEPARTMENT OF JUSTICE,

February 25, 1899.

SIR: I have the honor to acknowledge the receipt of your communication of February 13, 1899, making some further suggestions and requesting a further opinion as to the liability of the Post-Office Department for foreign registered matter lost in the mails.

The situation involved is this: On January 3, 1899, in response to questions of the Postmaster-General, the Attorney-General rendered an opinion as to the liability of the Post-Office Department for foreign registered matter lost in the mails. At the date of the communication asking such opinion the Universal Postal Union convention of Vienna was in force, and the questions asked had, in part, relation to that convention, which was superseded January 1, 1899, by the convention of Washington, now in force, and to which the present communication in part relates.

Each of these conventions, as did the earlier ones of Paris and Lisbon (to all of which the United States was a contracting party), provided for the registration of a great variety of mail matter—letters, post cards, printed matter,

samples of merchandise, etc.—and for the loss in the mails of any article of which an indemnity of 50 francs was provided, irrespective of the value of the article lost.

But, by a protocol to each convention, the nations outside of Europe, whose legislation was then opposed to the principle of indemnity, were, temporarily, free to postpone the adoption of this principle until they could obtain legislative authority to adopt it. But, in the meantime and until so adopted, the other contracting nations were not bound to pay an indemnity for the loss of registered matter originating in, or addressed to, such nonadopting countries. .

At the dates of these conventions, before that of Washington, the United States was one of the countries thus described whose legislation was opposed to this principle of indemnity, and, under these protocols, while adhering to and carrying out the other provisions of these conventions, it has, from the first, hitherto declined, and still does, to adopt or carry out the plan of registry and indemnity provided in these conventions, and which, therefore, has never been operative as between the United States and the other countries of the Universal Postal Union.

Instead of adopting the plan of registry and indemnity furnished by the Universal Postal Union convention, the United States adopted one of its own, and by the act of February 27, 1897 (29 Stat., 599), provided that "For the greater security of valuable mail matter the Postmaster-General may establish a uniform system of registration, and as a part of such system he may provide rules under which the sender or owners of first-class registered matter shall be indemnified for losses thereof in the mails, * * * but in no case to exceed ten dollars for any one registered piece or the actual value thereof when that is less than ten dollars."

Under the authority of this section the Postmaster-General established and promulgated June 21, 1898, a rule, of which the following is an extract:

"Section 1134½. Indemnity for the loss in the mails of a piece of registered first-class mail matter will be paid in accordance with the limitations prescribed in amended section 1031 of the Postal Laws and Registrations."

The remaining portions of the rule having relation to details of regulations is not important here.

The gist of the before-mentioned opinion of the Attorney-General is that both the statute and the rule of the Post-Office Department, above referred to, included and applied to foreign as well as domestic mail matter, and created a liability of that Department to pay this limited indemnity for foreign as well as domestic registered first-class mail matter lost in the mails.

I have still no doubt that that opinion is the correct one, even though that conclusion results in the obvious condition of things pointed out by the Postmaster-General, and although, as now stated, it was not intended by the Department that the rule above partially quoted should apply to foreign registered mail matter. The actual intention of the framers or parties to a written document, so far as it is important that such actual intention be inquired for, is generally to be determined by the meaning of the language used to express it. And while in cases where the meaning of this language is doubtful and the language fairly susceptible of different meanings the consequences of a particular construction may be considered in determining which construction should be adopted, yet where the language is plain and when read in the light of the existing facts and of the object intended to be attained fairly admits of but one meaning the consequences must be serious indeed which warrant a departure from such plain meaning.

The obvious result, and as pointed out by the Postmaster-General, is that the United States, under this rule of the Department, will pay this limited indemnity for the loss in the mails of foreign registered first-class mail matter, while the other countries of the postal union do not, as between them and the United States, pay for registered matter lost in their respective services. This is the necessary result of these different systems, and must continue as long as such systems prevail.

The most of the suggestions and questions in the present communication of the Postmaster-General have relation to the remedy for these existing conditions, and to whether he can now adopt the registry and indemnity provisions of the

convention of Washington or use the appropriation made by the act of June 13, 1898, in paying claims and adjusting balances with the other countries.

Section 398, Revised Statutes, provides that "for the purpose of making better postal arrangements with foreign countries, or to counteract their adverse measures affecting our postal intercourse with them, the Postmaster-General, by and with the advice and consent of the President, may negotiate and conclude postal treaties or conventions, and may reduce or increase the rates of postage on mail matter conveyed between the United States and foreign countries."

In the absence of any other expression of the will of Congress, this section would authorize the Postmaster-General to not only negotiate and conclude on behalf of the United States these different conventions, as he did do, but to also adopt and carry out the registry provisions of those conventions, including those for indemnity; and if when the first of those conventions went into effect he had done so, it would have been strictly within his province. But a long continued course of conduct on the part of a government or one of its departments may have the force and effect of law in either conferring, denying, or limiting the power of executive departments or officers. And when from the first, hitherto, through so many years, the Post-Office Department has, with the tacit assent and approval of Congress, declined to adopt or carry out the registry system of these conventions, this would seem to have become the settled policy of the Government, and to now adopt one so radically different would seem to be the engrafting upon our postal system by the Postmaster-General not only a plan hitherto unknown in our system, but one which has for many years had the actual disapproval of the Post-Office Department and the tacit disapproval of Congress, and would seem to be inadvisable and of at least doubtful authority.

But Congress has spoken. The act of February 27, 1897, before cited, in authorizing the Postmaster-General to establish a system of registration and, as part of such system, to provide a limited indemnity for first-class registered matter lost in the mails, especially in connection with the fact

of the long-continued refusal of the Government to adopt the system of those conventions, must be taken as the only plan which Congress is at present willing to adopt, and as prohibiting to the Postmaster-General the establishment or adoption of any other rules than those thus authorized.

And the act of June 13, 1898, making appropriations for the service of the Post-Office Department, appropriates "For payment of limited indemnity for the loss of pieces of first-class registered matter, as provided in the act of Congress approved February 27, 1897, * * * six thousand dollars."

This also must be taken as the limit to which Congress is at present willing to go in this direction, and in connection with the act of 1897, to which it refers, an implication against the authority of the Post-Office Department to incur a liability requiring any further appropriation.

But even if the Postmaster-General should adopt the registry plan of the convention of Washington, he would find himself without means to meet the liabilities thus incurred, for the reason next stated in reply to another question in the present communication from the Postmaster-General.

The above appropriated \$6,000 can be used only for the specific purpose stated, and can not be used "in paying claims and adjusting balances with foreign countries for lost registered mail matter."

Besides, inasmuch as the other countries do not, as to the United States, pay for lost registered mail matter, and as we pay such losses without reference to what other countries may do, there will be no such balances to be adjusted.

The whole matter would be exemplified by considering, as the fact is, that the registry provisions of the convention of Washington are not operative in or as to the United States, and that our liability is merely that imposed by the act of 1897 and the rules of the Post-Office Department in pursuance thereof, and is quite independent of that convention.

There is no provision for a partial or modified adoption of the registry provisions of the convention of Washington. If accepted at all, it must be in their entirety, and, until so adopted, the other countries of the postal union are not bound to pay for lost registered matter originating in or

addressed to the United States. And it is not accurate to say that these provisions can be made operative to a limited extent, or partially, except by amendment.

There is, then, until Congress shall otherwise provide, but one of two courses to be pursued:

First. Pay the limited indemnity as provided in the act of 1897, irrespective of what other countries may do; or,

Second. So amend the rules of the Department as to limit the indemnity to lost registered matter originating in and addressed to a place within the United States. Either of which courses the Postmaster-General may adopt.

This choice should not, perhaps, depend so much upon what the other countries may or may not do in this direction as upon consideration of whether, in view of the interest of our own people and the interests of the postal service, it is desirable to continue to extend this limited indemnity to foreign as well as to domestic lost registered-mail matter, independently of what the other countries may do. It would not seem inappropriate that the Government, in its postal service, should extend to foreign registered matter the same indemnity that it affords for domestic registered matter lost in its service.

In case such an amendment of the rules of the Department is decided it is suggested that, inasmuch as the opinion of the Attorney-General that the existing rules require indemnity for lost foreign as well as domestic registered mail matter, the amendment be accompanied by an explanation showing the unequal and unfair operation of the two systems and the necessity for such change.

Respectfully,

JOHN W. GRIGGS.

The POSTMASTER-GENERAL.

STAMP TAX—BONDS—PROMISSORY NOTES.

The liability of an instrument to a stamp tax, as well as the amount of such tax, is determined by the form and face of the instrument, and can not be affected by proof of facts outside of the instrument itself.

A bond is an obligation in writing and under seal, binding the obligor to pay a sum of money to the obligee. It is sometimes denominated a specialty, being under seal, as distinguished from a simple promise to pay not sealed.

A promissory note is an unconditional promise to pay to another's order, or bearer, a stated sum of money at a specified or implied time.

DEPARTMENT OF JUSTICE,

February 25, 1899.

SIR: I have the honor to acknowledge receipt of yours of the 20th instant, which is referred to me by the Attorney-General with the request that I draft an answer.

You ask the Attorney-General if he indorses an advisory opinion which I rendered to the Commissioner of Internal Revenue sometime ago relative to the stamp required upon bonds and promissory notes under the provisions of the war-revenue act.

Before coming to the main question, I think it is proper that I should state the circumstances under which the advisory opinion referred to was rendered. I was responding to a request from the commissioner for an opinion as to whether both a promissory note secured by mortgage and the mortgage itself were severally subject to stamp duty. After answering this inquiry in the affirmative, I said, in substance:

"In this connection it should be held that a paper given for the payment of money lent at the time, or previously due or owing, in the ordinary business transactions, where the same is attested with the seal of the maker, should be treated as a promissory note, although technically it may come under the head of a bond by reason of the fact that it has the word "seal" written after the name of the signer. In some of the States it is the usual form in cases where mortgages are executed to secure the payment of money for the mortgagor to give also what is called a "bond," but which is nothing more nor less than a promise to pay money borrowed or otherwise owing."

I did not intend by this opinion to induce a ruling by the commissioner involving the well-defined legal distinctions between a bond and a promissory note. I had in mind the fact that the tax in many instances upon a promissory note

is greater than that upon a bond, and it occurred to me that the makers of promissory notes would realize this fact, and, by the addition of a seal to a paper which was otherwise only a promissory note, transform it technically into a bond and thus evade the tax; and it was my purpose to have the commissioner make a ruling in advance which would have the effect to prevent such effort at evasion and thereby save taxes to the Government.

Having said this much in explanation of the opinion above cited, which was given hurriedly and under the circumstances stated, and which was not intended to, and could not have the effect of a legal opinion rendered by the Attorney-General, I will now proceed to consider the subject presented by your letter.

The trouble about this matter appears to have arisen because of the fact that the Commissioner of Internal Revenue made a ruling in which he did not confine my opinion to the tax upon papers which were in form promissory notes, with a seal attached after the name of the maker, as before stated, but applied it to all bonds accompanying real estate mortgages given by private individuals. It is possible that, in the short opinion which I gave the commissioner, I did not express myself as fully as I should have done, and confusion about this question has consequently been brought about.

I do not deem it necessary to have the Attorney-General answer categorically whether he indorses what I said to the Commissioner of Internal Revenue or not, for, as I said above, I had in mind one thing and the Commissioner seems to have understood the scope of the opinion which I gave to include another. Now that the question is presented squarely and I am called upon to construct an opinion in response to the request of the head of an executive department, I feel constrained to hold that, in the administration of the provisions of the war-revenue act pertaining to duties to be paid by stamps, the classification of instruments requiring stamps as described in the law itself must be maintained, and the liability of the instrument to the stamp duty, as well as the amount of such duty, must be determined by the form and face of the instrument itself.

The Supreme Court of the United States in *United States v. Isham* (17 Wall., 496, 503) laid down the following rules relative to the stamping of instruments under the internal-revenue law:

"First. Instruments described in technical language, or in terms especially descriptive of their own character are classed under that head and are not to be included in the general words of the statute.

"Second. The words of the statute are to be taken in the sense in which they will be understood by that public in which they are to take effect. Science and skill are not required in their interpretation, except where scientific or technical terms are used.

"Third. The liability of an instrument to a stamp duty, as well as the amount of such duty, is determined by the form and face of the instrument, and can not be affected by proof of facts outside of the instrument itself.

"Fourth. If there is a doubt as to the liability of an instrument to taxation, the construction is in favor of the exemption, because, in the language of Pollock, C. B., in *Girr v. Scudds*, 'a tax can not be imposed without clear and express words for that purpose.'

And the court says in this case that "these principles are based in good sense and are sustained by the authorities."

Adopting the principles declared in this decision, it is only necessary to observe the legal distinction between a bond and a promissory note in order to arrive at the manner of taxing each. A bond, say the law writers, is an obligation in writing and under seal, binding the obligor to pay a sum of money to the obligee. It is sometimes denominated a specialty, being under seal, as distinguished from a simple promise not sealed. By the common law, a seal is of the essence of a bond, and no writing can have the qualities which attach to a bond without the seal of the party executing it. A promissory note is an unconditional promise to pay to another's order, or to bearer, a stated sum of money at a specified or implied time. The person who executes a note is called the maker, and he to whom it is made payable is called the payee.

Thus the distinction between the two instruments is well defined and easily discernible.

Very respectfully,

JAS. E. BOYD,
Assistant Attorney-General.

Approved.

JOHN W. GRIGGS.

MILITIA—ORDNANCE STORES.

The ordnance and other stores belonging to the several States, taken or accepted by the Government for use in the war with Spain, should not be returned in kind, but should be paid for at the price agreed upon, or in the absence of an agreement, what they were worth.

In the absence of any of the appropriation for the maintenance of the militia in the several States, or of arms, ordnance stores, etc., purchased with it, the Government is not required or empowered to issue to the several States stores in kind to replace such arms, ordnance stores, etc., as were exhausted, consumed, or impaired by use in the war with Spain; nor can it make compensation for such stores, as they were the property of the United States.

DEPARTMENT OF JUSTICE,
February 23, 1899.

SIR: I have the honor to acknowledge receipt of yours of the 23d of January ultimo, requesting my legal opinion upon the following statement of facts as given in your letter:

“At the commencement of the war with Spain certain of the States turned over to the United States a part of the quartermaster and ordnance stores which were at the time in use by the militia organizations of said States. A part of the stores thus turned over had been more or less used and were, consequently, of somewhat less value than when new. The commanding officer of each volunteer organization was directed to convene a board of officers of his command to determine the value of said stores at the time they were turned over to the United States.

“Certain of these States having requested the return of these stores in kind, I have the honor to request your opinion—first, whether this Department can legally issue to said States new stores for those turned over by them to

the United States; and, second, whether this Department can legally allow said States credits for the stores turned over at the value determined by said board of officers and issue new stores to said States to the extent of said credits."

Upon investigation of the matters involved in your request I find that there are two questions which arise upon the facts presented by you.

The first is as to arms, ordnance stores, quartermaster stores, and other equipments which belonged to the several States, and which were turned over by the States for use by the troops of the Volunteer Army of the United States in the war with Spain—the inquiry being whether such stores, etc., should be returned in kind or paid for by the Government.

The second is as to what course shall be pursued by the Government in regard to arms, ordnance stores, quartermaster's stores, and camp equipage, the property of the United States, in use by the militia in the States when the war with Spain commenced, and which were carried into the service and used by the troops of the States when accepted as a part of the Volunteer Army of the United States.

The first question is readily answered. The ordnance and other stores belonging to the several States, which were taken or accepted by the United States for use in the war, should be treated in like manner as such stores procured from any other source. When the Government accepted them it incurred the obligation to pay the price agreed upon, or, in the absence of an agreement as to price, to pay whatever they were worth. In either case there appears to be no great difficulty in arriving at the amount for which the Government is liable. As stated, the value of the stores was, in some instances, made by boards of appraisers. If the valuations made by these boards were acceptable to both parties the Government ought to pay the amounts thus ascertained, but if, on the other hand, the boards and their work were the mere *ex parte* action of the Government, to which the States did not assent, then the Government assumed the liability of paying whatever the stores furnished were worth, to be arrived at in some feasible manner.

It is impossible to see how stores of the character de-

scribed, belonging to the States, furnished to the Government, can be returned in kind, for, as stated, these stores had been more or less used, and it would be exceedingly difficult to arrive at any satisfactory basis for returning property of like character and quality.

As to the other question: As I understand it, the question concerns stores which were in the possession of the States and which had been furnished by the United States to the militia of the States under the provisions of the act of February 12, 1887 (24 Stat. L., 401), which is in these words:

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section sixteen hundred and sixty-one of the Revised Statutes be, and the same is hereby, amended and reenacted so as to read as follows:

'SECTION 1. That the sum of four hundred thousand dollars is hereby annually appropriated, to be paid out of any money in the Treasury not otherwise appropriated, for the purpose of providing arms, ordnance stores, quartermaster's stores, and camp equipage for issue to the militia.

'SEC. 2. That said appropriation shall be apportioned among the several States and Territories under the direction of the Secretary of War, according to the number of Senators and Representatives to which each State respectively is entitled in the Congress of the United States, and to the Territories and District of Columbia such proportion and under such regulations as the President may prescribe: *Provided, however,* That no State shall be entitled to the benefits of the appropriation apportioned to it unless the number of its regularly enlisted, organized, and uniformed active militia shall be at least one hundred men for each Senator and Representative to which such State is entitled in the Congress of the United States. And the amount of said appropriation which is thus determined not to be available shall be covered back into the Treasury.

'SEC. 3. That the purchase or manufacture of arms, ordnance stores, quartermaster's stores, and camp equipage for the militia under the provisions of this act shall be made under the direction of the Secretary of War, as such arms, ordnance, and quartermaster's stores and camp equipage are

now manufactured or otherwise provided for the use of the Regular Army, and they shall be receipted for and shall remain the property of the United States, and be annually accounted for by the governors of the States and Territories, for which purpose the Secretary of War shall prescribe and supply the necessary blanks and make such regulations as he may deem necessary to protect the interest of the United States.

‘SEC. 4. That all arms, equipments, ordnance stores, or tents which may become unserviceable or unsuitable shall be examined by a board of officers of the militia, and its report shall be forwarded to the governor of the State or Territory direct to the Secretary of War, who shall direct what disposition, by sale or otherwise, shall be made of them; and, if sold, the proceeds of such sale shall be covered into the Treasury of the United States.’”

The States did not own these stores, but by the express terms of the act they remained and were the property of the United States. It was undoubtedly the purpose of Congress in enacting the above legislation to authorize the General Government to provide arms, ordnance stores, quartermaster's stores, and camp equipage for the militia of the several States, with a view of having an organized force, with equipments, ready in case of emergency. An emergency arose when the war with Spain was declared, and although the militia as such was not called into active service, the several States furnished quotas of troops, which were mustered in as a part of what was called the Volunteer Army of the United States, and the arms, ordnance stores, etc., which were already in possession of the States, under the provisions of the above act, were used in equipping and providing for the said troops. There is most certainly no law under which the United States can pay the States for arms, ordnance stores, etc., furnished by virtue of the foregoing law, because, as before stated, these stores were the property of the United States, and did not belong to the States at all; and when the soldiers in the Army of the United States were using these stores, they were using property of which the Government was the sole owner.

The only question, then, is as to whether the Government

is either empowered or required to issue to the several States stores in kind to replace such of these arms, ordnance stores, etc., as were exhausted, consumed, or impaired by use in the war with Spain, or, in case the Government can not return such stores in kind, are the States entitled to credit by the Government for the value of such stores?

I do not hesitate to advise that the Government has no authority to supply stores of this character to be issued to the militia of the States from the general appropriations for the War Department, the power being derived from the act above quoted. If any part of the appropriation made by the said act remains, or if there are arms, ordnance stores, quartermaster's stores, and equipage on hand, purchased under authority of the same, and the appropriation made thereby, I do not doubt the right of the Government to refurnish the several States from this source. But in the absence of this appropriation, or of arms, ordnance stores, etc., purchased with it, I do not find any lawful authority by which such stores can be again supplied to the militia of the several States.

Very respectfully,

JAS. E. BOYD,
Assistant Attorney-General.

Approved.

JOHN W. GRIGGS.

The SECRETARY OF WAR.

STAMP TAX—REINSURANCE POLICIES.

The purpose of Schedule A of the war-revenue law is to tax the policy by which an insurance is made, either life, fire, or marine, and not the reinsurance of such policy.

DEPARTMENT OF JUSTICE,
March 2, 1899.

SIR: I have the honor to acknowledge receipt of yours of February 10, ultimo, relative to the scope of the opinion recently rendered by me in response to your request concerning what are called "reinsurance policies," whether or not such policies are required to be stamped under the provisions of Schedule A of the war-revenue act.

You state in your letter that the Commissioner of Internal

Revenue calls attention to the fact that the opinion relates only to the tax on reinsurance of life policies, whereas an opinion was requested on the reinsurance of all kinds of policies mentioned in Schedule A of said act, and you inquire whether the opinion which I have rendered in regard to life insurance will cover the reinsurance of other kinds mentioned in the act.

The opinion which I rendered was based upon a state of facts which I copy from the letter of the Commissioner of Internal Revenue, as follows:

"This question of reinsurance relates only to the assumption by one insurance company of a part of a risk taken by another on receiving a proportionate part of the premium that was originally paid. It is of no interest to the beneficiary or the party primarily insured, except perhaps as the double insurance may contribute to his benefit in case of the insolvency of the company with which he originally contracted."

In the opinion which I gave I advised you that such transactions between life-insurance companies, after the policy of insurance had been issued to an individual, were not taxable under the provisions of the law. The same principle applies to fire and marine insurance companies, for the law is substantially the same as regards the tax upon all classes of insurance policies. It was the purpose of the law to tax the policy by which the insurance is made, either life, fire, or marine; and there is no reasonable construction of it which would tax a transaction between the insurance companies themselves by which a risk taken by a policy already issued is divided.

Respectfully,

JAS. E. BOYD,
Assistant Attorney-General.

Approved.

JOHN W. GRIGGS.

THE SECRETARY OF THE TREASURY.

MARINE CORPS—LONGEVITY.

Credit should be given a person seeking promotion in the Marine Corps, as well as in the Navy proper, for the time of service of such person as a cadet at the Naval Academy and at sea anterior to commission, in making the promotions provided for by the act of March 3, 1899.

DEPARTMENT OF JUSTICE,

March 4, 1899.

SIR: I have the honor to acknowledge receipt of yours of this instant, relative to a certain provision of the act recently approved by the President entitled "An act to reorganize and increase the efficiency of the personnel of the Navy and Marine Corps of the United States." You call my attention to the following provision of the said act:

"That the staff of the Marine Corps shall consist of * * * two assistant quartermasters and *one assistant paymaster*, each with the rank of major; and three assistant quartermasters with the rank of captain. That the vacancies created by this act in the departments of the adjutant and inspector and paymaster shall be filled first by promotion according to seniority of the officers in each of these departments, respectively, and then by selection from the line officers on the active list of the Marine Corps not below the grade of captain, *and who shall have seen not less than ten years' service in the Marine Corps;*"

and then to the following, from the act making the appropriations for the naval service for the fiscal year ending June 30, 1897, approved June 10, 1896:

"That all officers who have been or may be appointed to any corps of the Navy or to the Marine Corps after service in a different corps of the Navy or of the Marine Corps shall have all the benefits of their previous service in the same manner as if said appointments were a reentry into the Navy or into the Marine Corps."

You then say:

"In view of the foregoing provisions of law, I have the honor to ask your opinion as to whether or not an officer who entered the Marine Corps from the Naval Academy July 1, 1893, and has served in the corps continuously until this date, is, by reason of his service of six years as a naval cadet, i. e., four years at the Academy and two years at sea before being commissioned, in connection with his Marine Corps service, eligible to appointment to the position of assistant paymaster with the rank of major, provided for in the clause of the personnel bill hereinbefore quoted. It may be proper to add that, by virtue of promotion to be made

under other provisions contained in the personnel bill, the officer referred to will have the rank of captain, a necessary qualification in connection with his advancement to the place sought."

The only question presented by your inquiry is as to whether, in estimating the time which is necessary for qualification for the promotion provided for by this law, the time of service as a naval cadet at the Naval Academy and at sea shall be counted.

There can be no doubt about the proposition that the time of service of a cadet at the Naval Academy and at sea anterior to commission is as much a time of preparation for service in the Marine Corps as it is in the Navy proper, because the Marine Corps is an essential part of the naval organization. I understand that, in the appointments and promotions in the Navy proper the time of preparation at the Academy and at sea has always been counted as time served. That being the case, and the Marine Corps being a part of the Navy, and this preparation at the Academy and at sea being necessary in order to qualify for service in the Marine Corps, I see no reason why the benefits of the time at the Academy and at sea anterior to commission should not be given to persons seeking promotion in the Marine Corps as well as in the Navy proper. I think this view is sustained by the provision of the act of June 10, 1896, to which you call special attention.

In view of these and other considerations which it is not necessary to discuss here, I advise you that my opinion of the law is, that in making the promotions provided for by the recent act of Congress in the Marine Corps, an applicant is entitled to have his time at the Naval Academy and at sea anterior to commission counted as time of service.

Respectfully,

JAS. E. BOYD,

Assistant Attorney-General.

Approved.

JOHN W. GRIGGS.

The SECRETARY OF THE NAVY.

NAVY—RETIREMENT.

The provisions of the act of March 3, 1899, relative to voluntary or compulsory retirement, applies to the current year ending June 30, 1899, as well as any fiscal year in the future.

DEPARTMENT OF JUSTICE,

March 8, 1899.

SIR: I have the honor to acknowledge receipt of yours of the 6th instant, in which you refer to the act of Congress approved March 3, 1899, entitled "An act to reorganize and increase the efficiency of the personnel of the Navy and Marine Corps of the United States." You quote certain provisions of the said act and submit for my opinion the following question:

"Whether the words 'when at the end of any fiscal year,' as employed in section 8, and 'should it be found at the end of any fiscal year,' as used in section 9, of the act indicated, apply to the current fiscal year, or whether it is the intent of the act that one complete fiscal year shall elapse before the voluntary or compulsory retirements provided for in the two sections cited are to be made."

Undoubtedly a complete fiscal year must elapse before the retirements provided for in the two sections referred to can be made; but, in my opinion, a proper construction of the language of the act does not lead to the conclusion that the full fiscal year must elapse after the passage of the law. The law is now in force, and the language in both sections is "at the end of *any* fiscal year." There can be no other reasonable interpretation than that this applies to the end of any fiscal year occurring after the passage of the act—not that the whole of the fiscal year shall elapse during the existence of the act, but that the end of the fiscal year shall occur after the act goes into effect.

The fiscal year, as established by the laws of the United States, begins on the first day of July and ends on the 30th day of June next following.

My opinion is that the provisions of this act, which went into effect on the day of its approval, March 3, 1899, apply as well to the current fiscal year, which ends on the 30th

of June next, as to any fiscal year in the future whilst the law is in existence.

Respectfully,

JAS. E. BOYD,

Assistant Attorney-General.

Approved.

JOHN K. RICHARDS,

Acting Attorney-General.

The SECRETARY OF THE NAVY.

ARMY—QUARTERMASTERS.

The act of March 2, 1899, takes from the four principal assistants of the Quartermaster-General the rank of colonel, and the increased rank of the Quartermaster on the staff of the Commanding General of the Army, given them by the act of July 7, 1898.

DEPARTMENT OF JUSTICE,

March 10, 1899.

SIR: The act of July 7, 1898, to increase the efficiency of the Quartermaster's Department, provides that "during the existing war, and for a period not exceeding one year thereafter," the Secretary of War may "assign a suitable officer" in charge of each of certain divisions of the Quartermaster's Department, and "may assign to duty" as special inspectors of the Quartermaster's Department not exceeding four officers, and that he "may assign" an officer of the Quartermaster's Department in charge of each principal depot of the Quartermaster's Department, not exceeding twelve; and that all these officers so assigned, and also the "Quartermaster on the staff of the Commanding General of the Army" shall have "the rank next above that held by them and not above colonel." This act also provides that the four principal assistants of the Quartermaster-General, while so acting, shall have the rank of colonel.

The eleventh section of the act to increase the efficiency of the Army, approved March 2, 1899, reads as follows:

"That so much of the acts approved July seventh, eighteen hundred and ninety-eight, as authorizes the assignment of certain officers of the Quartermaster's and Subsistence departments with increased rank, and the continuance in

service of certain volunteer officers of those departments for a period of one year after the close of the present war, is repealed."

After calling my attention to this legislation, you request my opinion as to whether the act of March 2, 1899, takes from "the four principal assistants of the Quartermaster-General" the rank of colonel given them by the act of July 7, 1898, and the increased rank given by it to "the quartermaster on the staff of the Commanding General of the Army."

The point suggested in your inquiry is, that "the four principal assistants of the Quartermaster-General," and "the quartermaster on the staff of the Commanding General of the Army" should be segregated from the other officers of the Quartermaster's Department affected by the act of July 7, 1898, and allowed to retain the increased rank conferred by it on the ground that they do not hold assignments authorized by the act, but simply enjoy increased rank under assignments existing when the act was passed. While it may be true that the act of July 7, 1898, did not authorize the specific assignments in question, in the sense of creating new and additional assignments, yet it did attach to these assignments increased rank and therefore did authorize the assignments as assignments with increased rank. The existing and additional assignments to which increased rank was attached by the act all became assignments with increased rank authorized by the act. The act of March 2, 1899, was directed especially to such assignments—assignments carrying increased rank under the acts of July 7, 1898. It repealed the authority for assignments with increased rank in the Quartermaster's and Subsistence departments, I can see no reason for exempting the four principal assistants of the Quartermaster-General and the quartermaster on the staff of the Commanding General from the effects of this repeal.

I have no hesitation, therefore, in answering your question in the affirmative.

Respectfully,

JOHN K. RICHARDS,
Acting Attorney-General.

THE SECRETARY OF WAR.

PHILIPPINE ISLANDS—SPANISH PRISONERS.

Under the treaty with Spain the United States obligated itself to convey from the Philippine Islands to Spain, only such Spanish soldiers as were actually made prisoners of war either by the United States or by the insurgents.

Troops remaining under arms, under the control and direction of Spanish officers, are to be removed at the expense of the Spanish authorities.

DEPARTMENT OF JUSTICE,

March 15, 1899.

SIR: In response to your request to be advised as to what Spanish soldiers this Government, by the treaty of Paris, contracted with Spain to convey from the Philippine Islands to Spain, I have the honor to advise you as follows:

The subject is covered by Articles V and VI of the treaty of peace signed at Paris on December 10, 1898. The statements of the treaty are so specific that a mere recital of them will be sufficient.

It is provided in Article V that the United States will, upon the signature of the present treaty, send back to Spain, at its own cost, the Spanish soldiers taken as prisoners of war on the capture of Manila by the American forces.

This provision includes only one class, namely, such Spanish soldiers as were actually surrendered to the United States forces as prisoners of war upon the capture of the city of Manila. It does not relate to the soldiers of Spain that remained under arms in different parts of the Philippine Islands at the time of the treaty of peace. These latter never became subject to the orders or control of the United States, and never were actually prisoners of war, but were those forces which, remaining under the control of the Spanish authorities, were to be removed by Spain as a part of the evacuation of the Philippines, which, by Article V of the treaty, Spain agreed, upon the exchange of the ratifications of the treaty, to carry into effect.

Article VI of the treaty makes provision for the surrender and return of another class of prisoners, namely, those prisoners held by Spain as prisoners of war, or detained or imprisoned for political offenses in connection with the insurrection in Cuba and the Philippines and the war with the United States. Reciprocally, the United States agreed to

release all persons made prisoners of war by the American forces, and undertook to obtain the release of all Spanish prisoners in the hands of the insurgents in Cuba and the Philippines.

All prisoners of war released by the United States, or caused by them to be released on the part of the insurgents, the United States also agreed to return to Spain at its own cost.

So that the entire scope of the article relates only to those who were actual prisoners of war in the custody of the United States or in the custody of the insurgents and subsequently surrendered to the United States.

No part of the treaty obligates the United States to return any Spanish soldiers except those who had been actually made prisoners of war either by the United States or by the insurgents. Troops remaining under arms, under the control and direction of Spanish officers, are to be removed under the evacuation clause of the treaty, and not at the expense of the United States.

Very respectfully,

JOHN W. GRIGGS.

The SECRETARY OF WAR.

CUBA—CONCESSIONS.

The obligations of the United States with reference to Cuba are merely those which arise from the fact that it is a temporary military occupant. The United States Government is not the successor of the Government of Spain in Cuba, but merely an intervening power arranging the succession, and as such it can not be held to have assumed the obligations arising from or growing out of concessions granted or contracts entered into by the Spanish Government in Cuba previous to its surrender of sovereignty therein.

DEPARTMENT OF JUSTICE,
March 17, 1899.

SIR: I have your letters of the 4th and 10th instant, concerning concessions to British companies for cables at or near Cuba and the Philippines.

You say you are awaiting my views as to the subjects in question for communication to the British embassy.

The ambassador says that the considerations submitted with pro memoria relating to the Philippine concession apply as strongly to the case of Cuba, and it is upon that he relies.

The pro memoria thus referred to says:

“The obligations contracted by Spain under those concessions are of a local nature, and it will not be contested, as Her Majesty’s Government believe, that they become binding on the United States Government on their taking possession of the islands or assuming effective control of them, whether under a formal protectorate or otherwise. On the faith of those concessions the company has expended vast sums for the benefit of the islands, and the obligations in question clearly belong to that class of local obligations which have always been held to be transferred with the sovereignty and to pass with the territory.”

American control of Cuba is essentially, and merely that, of a temporary military occupant. Our obligations, therefore, are those which arise from that fact. Benefits to the island and obligations local to the island, so far as becoming obligations of the United States, would seem from their very nature obligations of the island or its people, and not of a military occupant entering for a single and temporary purpose.

If a protectorate would make the protector obliged by the concessions, we have not established a protectorate over Cuba, and it is needless to discuss the soundness of such a questionable proposition.

That all the debts which are or may be inherited by the government of Cuba from the Government of Spain are now debts of the United States, payable from the Federal Treasury, logically follows from the argument of the ambassador, and certainly seems to me a conclusion without law or reason or justice in support of it.

That we are wholly free from responsibility with regard to the affairs of the island, while temporarily occupying it, is not pretended; but, as I have said, our duty is to do and abstain from those things which a mere temporary military occupant still theoretically at war with Spain ought to do and abstain from, and not the duty of assuming all the exec-

utory and other contracts which may belong to the past Government or its successor.

Our Government is not such successor, but merely an intervening power arranging the succession. It did not make the contract of concession; it is not the beneficiary receiving the benefits said to accrue to the island from the cables, nor is it the island or locality to which the obligations are said to be locally attached. Neither does it appropriate to itself the revenue of the island.

In discussing the very celebrated decision in the case of debts on hypothecation due to Hesse Cassel, paid to Napoleon, and alleged by the restored Elector of Hesse not to be discharged thereby, Calvo (sec. 2489) remarks that the eminent authors of the decision to the contrary successfully established the distinction between the acts of a transitory conqueror—that is to say, one exercising authority only in virtue of a simple military occupancy—and a conqueror whose title to govern permanently is recognized.

Assuming, as we can not but do, that our military intervention and present aims are legitimate, we violate no contract in taking the necessary temporary measures to effectuate those aims. That our military officers should confine themselves to measures consistent with the nature of our occupation is, I suppose, understood by the signal officer referred to by the ambassador, and I am inclined to disbelieve that a permanent telegraph system such as would be used by the French company in regular competition with the lines in question is in contemplation. See my opinion, recently furnished the Secretary of War, concerning contracts of the city of Havana.

It is not suggested that, except in case we are bound by the contract of concession, a telegraph line for our own temporary purpose and governmental use by us in accomplishing it and preventing bloodshed while doing so, would give just cause of complaint by the concessionary. It seems to me probable that whatever is done or contemplated is of that character. If not, you can further advise me.

I think it well to suggest a doubt, however, whether the two concessions constitute a legal and just obligation upon the people and government of Cuba, for the reason, among

others, that both of them—one, of 1869, providing for a line from Santiago to Havana; the other, of 1895, a line from Manzanillo to Havana—were manifestly given in furtherance of the suppression of rebellious efforts by the people of the island terminating in its separation from Spain.

Turning now to the Philippine concessions, I find myself insufficiently provided with information. The concessions are not before me and there seems to be lack of agreement as to their terms. So far as definitely stated, however, they give a monopoly of the right to lay cables, not between the different Philippine islands, but from them to other countries. The infraction, however, is alleged as the proposed laying of interisland cables.

I think it is probable that the provision as to cables to other countries is a principal, if not the only, concession, and it seems clear that the interisland cables are projected exclusively for military reasons and as military necessities. I suppose the project is in a state of suspense at present, and therefore that there is ample time to obtain more full and precise information, with copies of the concessions.

We should at least be furnished with some definite knowledge of the terms of a contract alleged to be binding upon us before we can be expected to act upon that theory.

I may add, however, a doubt that promises or obligations in view of the laying of cables from the Philippines to other countries are in consideration of purely local benefits or to be regarded as local obligations that pass with the territory.

These are all merely tentative observations. The ambassador will perceive that the discussion involves principles indirectly affecting our whole course of procedure, present and future, with regard to Cuba and the Philippines, and not merely the private interest of the companies, to which no irreparable injury is threatened.

Requesting fuller information from the British ambassador and the War Department, I am,

Very respectfully,

JOHN W. GRIGGS.

The SECRETARY OF STATE.

PARIS EXPOSITION—CONCESSIONS.

The commissioner-general of the Paris Exposition has no authority to let a contract for the printing and publication of a catalogue of the United States exhibit, etc., in which the contractor is to receive no money from the United States, but is to derive his compensation therefrom from the proceeds of the sale of the catalogue and the insertion of advertisements therein.

Any money that might be derived by the commissioner-general through the granting of concessions, or the sale of a catalogue, belongs to the United States and should be turned into the Treasury.

DEPARTMENT OF JUSTICE,
March 18, 1899.

SIR: I have the honor to acknowledge the receipt, by your reference of the 6th instant, of the following questions submitted to you by the commissioner-general to the Paris Exposition of 1900:

“LEGAL QUESTIONS INVOLVED IN THE LAW CREATING THE
PARIS COMMISSION.

“The French authorities will grant a very limited number of concessions to citizens of the United States to do business on the exposition grounds, such as conducting restaurants, etc., upon the recommendation of the commissioner-general of the United States. These concessionaires will have to pay to the French authorities certain moneys for this privilege. The question in this case is whether the commissioner-general will be justified in accepting from such concessionaires as he may recommend any money consideration because of such recommendation.

“If the commissioner-general is justified in accepting such money consideration, can he use the money for purposes of the business of the commission without turning it into the United States Treasury?

“The French authorities accord to the commissioner-general of the United States the privilege of printing, publishing, issuing, and selling, or otherwise disposing of a catalogue of the United States exhibit and of the exhibit made by citizens of the United States under the commissioner-general. This catalogue would cost to the fund of the commissioner-general, if printed by the commission, many

thousands of dollars, the exact amount being impossible to estimate. The questions to be determined under this head are as follows:

"1. Can the commissioner-general let a contract for the printing and publication of this catalogue to responsible parties, retaining, of course, absolute control of the matter inserted and the manner of publication, the terms of which contract shall provide that the printer and publisher shall receive no consideration from the commissioner-general, but may sell the catalogues at a price to be determined by the commissioner-general, and may collect payment for such advertising as the commissioner-general may approve to be inserted in the catalogue, in this way saving to the fund of the commission the entire cost of publication?

"2. Should the commissioner-general let such a contract, which would relieve the commission of all cost of publication of the catalogue, can he also receive an additional financial consideration from the contractor; and if so, can he expend it in the conduct of commission business or must it be turned into the Treasury of the United States?

"If the commissioner-general should print, publish, and issue this catalogue at the cost of the commission fund, can he sell the catalogue to individuals desiring it; and if so, can he use the money received therefor for the use of the business of the commission or must it be turned into the United States Treasury?"

The first question is answered in the negative.

The contracts referred to would be void or of extremely doubtful validity and conformity with the spirit of the laws, and I strongly advise against them. (See act of May 1, 1884, 23 Stat. L., 17; Rev. Stat., 3732, 3709, 3786; 19 Opin., 650.)

Any money received in any of the ways suggested would be money of the United States in the hands of the commission, and there would be no authority to appropriate it to any particular object. It therefore should be turned into the Treasury.

Congress evidently intends to pay the expenses incident to our participation in the exposition, and does not contem-

plate any mere money-making arrangements to eke out the funds appropriated by it for the purpose.

Respectfully,

JOHN W. GRIGGS.

The PRESIDENT.

RELEASE OF SEIZED VESSEL.

The opinion of the Navy Department that it is proper and expedient to release the steamship *Abbey*, seized at Batangas, Philippine Islands, by Admiral Dewey, to the American claimant, concurred in.

DEPARTMENT OF JUSTICE,

March 18, 1899.

SIR: In reply to your communication of 17th instant, relative to the steamship *Abbey*, which was seized some time last September at Batangas, Philippine Islands, by order of Admiral Dewey, I have the honor to advise you that I concur in the opinion expressed in your letter, that it is now proper and expedient to release the vessel to the American claimant, Mr. Sylvester. But before doing so, I recommend that he be required to stipulate that he expressly waives, in consideration of the release, all claims for damages against the United States and its officials for the seizure and detention of the vessel.

The papers transmitted to me with your letter are herewith returned.

Very respectfully,

JOHN W. GRIGGS.

The SECRETARY OF THE NAVY.

SLAUGHTER OF INFECTED ANIMALS.

The Secretary of Agriculture may slaughter such sheep as are adjudged to be infected with a contagious disease or exposed to infection, and in making the compensation provided by the act of August 30, 1880, he is limited to those which were exposed to infection but not then infected.

The language of section 8 of this act, authorizing the slaughter of infected animals, is in terms merely permissive and not mandatory.

The violation of the provisions of a statute that subject a person to a penalty, whether a forfeiture or otherwise, must be something more than an accidental or unwitting violation.

DEPARTMENT OF JUSTICE,

March 20, 1899.

SIR: I have the honor to acknowledge the receipt of your communication of February 11, 1899, requesting my opinion as to the liability of the Department of Agriculture to make compensation to the owners of certain sheep slaughtered by direction of that Department, as infected by or exposed to contagious disease, and inclosing brief for the claimants and brief in reply by the Chief of the Bureau of Animal Industry, and the questions asked are these:

"First. Accepting the statement of facts made by the Chief of the Bureau of Animal Industry as correct, should the claimants receive any compensation from this Department?

"Secondly. In case you conclude that the claimants are entitled to any compensation, should the full value of all the animals slaughtered be paid, or should the compensation be limited to those animals which did not present symptoms of contagious disease?"

It would be difficult, if not impossible, to answer your questions put in this precise form, because of the difficulty of determining just what, in the long and elaborate statement or brief of the chief of the bureau referred to, are statements of facts, as distinguished from evidence, opinion, or conclusions of law. Besides, this statement claims as a fact that the sheep in question were knowingly and purposely imported in violation and in fraud of the only statute allowing compensation in such cases, and which, if true, would of course preclude any right to compensation. But perhaps an opinion based upon the following summary of facts, and which are sufficient for that purpose, will cover all that you desire. I take these facts from the two briefs referred to, and as to which there does not appear to be any substantial difference in views, viz:

The sheep—several thousands in number—were by the owners, Crary, Packer, and Knott, who had just purchased them in Mexico, imported therefrom into the United States at El Paso, Tex., on December 27, 1896. They were permitted and authorized by the United States officers to be brought across the Rio Grande River at this point into the United States without being first inspected, and the customs

duties upon such importation were paid by the owners to the Government officers in El Paso.

On, or very shortly after, their arrival at El Paso the inspectors there of the Department of Agriculture found, or suppose they did, that some of the sheep were infected with the contagious disease, the "scab," and so notified the owners, the collector of customs, and the Department of Agriculture.

The Mexican authorities at Juarez, the point across the river from El Paso, from which the animals were imported, refusing to permit the return of the sheep, they were all slaughtered by direction of the Department of Agriculture; and the owners now ask of that Department payment of the value of the sheep as compensation.

The matter here involved is governed by the act of August 30, 1880 (26 Stat., 414, 415), section 8 of which provides that—

"The Secretary of Agriculture may cause to be slaughtered such of the animals named in this act as may be, under regulations prescribed by him, adjudged to be infected with any contagious disease, or to have been exposed to infection so as to be dangerous to other animals, and that the value of animals so slaughtered as being so exposed to infection but not infected may be ascertained by the Secretary of Agriculture and owners thereof, if practicable; otherwise, by the appraisal of two persons familiar with the character and value of such property, to be appointed by the Secretary of Agriculture, whose decision, if they agree, shall be final. Otherwise, the Secretary of Agriculture shall decide between them, and his decision shall be final; and the amount of the value thus ascertained shall be paid to the owner thereof out of money in the Treasury appropriated to the use of the Bureau of Animal Industry; but no payment shall be made for any animal imported in violation of the provisions of this act."

It is claimed in the brief of the Chief of the Bureau of Animal Industry that the sheep here in question were imported in violation of the act referred to, and that therefore no compensation can be paid the owners under the section in part quoted above.

The only evidence in the case to which I have had access is the statements of such evidence in the respective briefs referred to, but as this is stated with much care and generally *in hæc verba*, and as each was apparently intent on stating all the evidence there was—the one in support and the other in denial of this claim of illegal importation—it may be fairly assumed that all the material evidence upon this claim is thus stated.

From the evidence thus stated it seems impossible to fairly conclude that this claim of importation in violation of the acts of Congress is sustained.

In this, as in most cases, the violations of the provisions of a statute that subject a person to a penalty, whether of forfeiture or otherwise, must be something more than an accidental or unwitting violation, and all through the statute referred to the penalties prescribed are only for knowing, willful, or proposed violations of its provisions; and this is in conformity with the general theory of penal statutes, and in this case I have no doubt that such knowing, willful, or proposed violation of the statute must be shown in order to deprive the owners of the right to compensation for their sheep thus slaughtered.

In this case, as in others where knowledge, purpose, or intention is required to be shown, this may be shown by attendant facts and circumstances from which such knowledge, purpose, or intention may be inferred, and in this case an illegal importation might be thus established, but I do not think that the evidence shows it here.

It appears that while these sheep were in quarantine, under the directions of the Department, in pursuance of the act referred to, their owners asked to be permitted, if the sheep were infected with the "scab," to treat them with a remedy which they, in common with other experienced stockmen, believed to be a specific for that disease, but this was refused as not being authorized by the statute, and, with no effort to save them, the sheep were slaughtered.

The object of this section is simply to prevent the spread of contagious disease, and, as in all such cases involving an interference with private property, the measures authorized should be carried out with as much regard for private prop-

erty and the rights of the individual citizen as is practicable and consistent with the attainment of the object sought, and in this case the destruction of several thousand dollars' worth of sheep would seem to have been warranted only in case this was found to be the only reasonable, practical way to prevent the spread of the infection; and that it would not have been unreasonable, as it certainly would not have been illegal, to permit the owners, while the sheep were in quarantine, to try, by reasonable measures, at their own expense, to save their property, and that the officers of the Bureau at El Paso might well have permitted this.

The language of the above section authorizing the Secretary of Agriculture to cause to be slaughtered animals infected with a contagious disease, or which have been exposed to infection so as to be dangerous to other animals, is, in terms, merely permissive and not mandatory. But the Chief of the Bureau of Animal Industry in his brief invokes the general rule that, unless otherwise indicated, statutes conferring upon public officers powers to be exercised for public purposes, though merely permissive in terms, are mandatory by construction. And he insists that in this case the statute is mandatory to the Secretary, who had no choice but to cause the animals to be slaughtered.

The rule is often thus applied, but the nature of the power, the subject-matter upon which it is to be exercised, the contingency of its exercise, the apparent necessity for discretion and judgment, and many other considerations often require a different construction, and such seems to be necessary in this case.

An act of this character, authorizing, upon the judgment of Government officials, on *ex parte* evidence, the arbitrary seizure, condemnation, and destruction of the private property of individual citizens, though for the general good, is a harsh measure at best, and the power thus conferred should be exercised only when necessary to the end required; and the determination of this necessity, and of whether and when it should be exercised, involves discretion and judgment, and does not admit of prior arbitrary direction. And this discretion is, by the section referred to, properly vested in the Secretary.

Besides, it will be observed that the power thus conferred, to cause to be slaughtered animals infected or that have been exposed to infection, is not limited to such animals imported into the United States, but "applies to all such of the animals *named* in this act" as are then infected or have been exposed to infection, and with the same object, viz, the prevention of the spread of the disease.

And if it were mandatory upon the Secretary of Agriculture to cause to be slaughtered all the sheep in the United States that were infected by or had been exposed to a contagious disease, and if the officers of that Department were as vigilant as officers ought to be, it is safe to say that the Secretary, under this statute, would exterminate more sheep, many of which might be cured, than would be lost by contagious disease even without Government protection.

Such is not the construction or object of the statute, but the power conferred is to be exercised or not, and when, and to what extent, according to the discretion of the Secretary of Agriculture, which should be exercised with a due regard to its necessity upon the one hand, and for the rights of private property upon the other.

Some of the foregoing observations are not strictly responsive to the questions asked, yet they are germane to and proper to be considered in connection therewith.

For some reason not apparent the section of the act referred to limits the compensation for animals thus slaughtered to such as have been exposed to infection but not infected. This latter expression means those animals in which the existence of the disease is not manifest.

I am, therefore, of opinion—

First. That the owners of these slaughtered sheep are entitled to compensation therefor; and

Second. That such compensation under the section referred to is limited to the slaughtered sheep in which the existence of the disease was not then manifest.

Respectfully,

JOHN W. GRIGGS.

The SECRETARY OF AGRICULTURE.

CENTRAL BRANCH UNION PACIFIC RAILROAD.

While the United States is named as a defendant in the bill of complaint to foreclose the mortgage on the Central Branch Union Pacific Railroad, no subpoena, citation, or other process was served upon it, nor did it appear as a party, and is, therefore, not barred by said decree of sale and might still redeem the property or cause its resale on account of its subsidy lien.

This railroad, in accepting the assignment of the rights and franchises of the Hannibal and St. Joseph Railroad Company, and the grant of lands, bonds, etc., conferred by act of Congress in aid of its construction, succeeded also to, and had imposed upon it, all the obligations, limitations, and conditions with reference to the application of compensation for services for the Government toward the payment of these subsidy bonds.

One-half of the compensation due from time to time for the services rendered by this road for the Government should be withheld and applied upon the bonds issued by the United States in aid of its construction, notwithstanding the foreclosure and sale of the same.

DEPARTMENT OF JUSTICE,
March 20, 1899.

SIR: I have the honor to acknowledge the receipt of your communication of the 10th instant, requesting my opinion, in substance, as to whether the Treasury Department should recognize the validity of the foreclosure sale of Central Branch Union Pacific Railroad, and pay in money for transportation service for the Government over that road, instead of applying such compensation, in whole or in part, upon the subsidy debt of that company to the United States.

Historically, the case is this: The Central Branch Union Pacific Railroad Company is but another name for the corporation chartered by the laws of Kansas by the name of the Atchison and Pikes Peak Railroad Company, and thus authorized to construct a railroad and telegraph line from Atchison, Kans., westward in Kansas, a distance of 100 miles. The change of name to the present one of Central Branch Union Pacific Railroad Company was by act of the legislature of Kansas of January 1, 1867.

The Hannibal and St. Joseph Railroad Company of Missouri is one of the Pacific railroad companies named in the Pacific railroad acts of Congress of July 1, 1862, and later acts; and by section 13 of said first-named act, was author

ized to extend its roads from St. Joseph via Atchison, for a distance of 100 miles westward from the Missouri River, and to there connect with a line forming part of the continuous line from the Missouri River to the Pacific Ocean, contemplated by said acts of Congress. And, by this act, the same grants of bonds and lands per mile, for this 100 miles, right of way, and other privileges were made to this company, as in the case of the Union Pacific Railroad Company, for its main line.

On June 9, 1863, the Hannibal and St. Joseph Railroad Company assigned all its rights under this act, so far as related to this 100 miles of railroad, to the Atchison and Pikes Peak Railroad Company, above mentioned, having, within the time prescribed, filed its acceptance of the provisions of said act, as therein required.

Under this assignment the Atchison and Pikes Peak Railroad Company, at first under that name, and afterwards under its present name of Central Branch Union Pacific Railroad Company, and under and in pursuance of said acts of Congress, and subject to the terms and provisions thereof, constructed the line of railroad and telegraph thus authorized, from Atchison, 100 miles westward in Kansas, to Westerville, and received in aid of such construction the lands and bonds and the other benefits provided by said acts, which subsidy bonds amounted to \$1,600,000, of which \$640,000 were issued before this change of name and the residue thereafter, and the issue and delivery of which bonds, under section 5 of the act of July 1, 1862, constituted a mortgage upon the whole of said railroad and telegraph line and properties, but subordinate to the liens of the mortgage next mentioned.

On May 1, 1865, and prior to said subsidy bonds, the Atchison and Pikes Peak Railroad Company executed its mortgage upon the whole of said 100 miles of railroad and telegraph and properties, to secure the payment of \$1,600,000 of its thirty-year 6 per cent bonds, and default being made of their payment, suit to foreclose said mortgage and sell all of said properties was commenced in the circuit court of the United States for the district of Kansas, and on February 7, 1898, a final decree was entered therein directing the

sale of all said properties, and which sale was made, and was confirmed by said court June 27, 1898, and a deed was made shortly thereafter conveying the whole property to the purchasers, and the property is now owned and operated by the corporation for whom the purchase was made.

The proceeds of this sale were not sufficient to pay any part of the subsidy claim of the Government, which remains unpaid.

While the United States is named as a defendant in the bill of complaint in this suit, yet no subpoena, citation, or other process was issued or served upon it, nor did it appear or become a party in the case, and is, therefore, not barred by said decree or sale; and if the whole property were of sufficient value to pay any considerable portion of this subsidy claim beyond the amount due on said first mortgage and costs, the United States might still redeem the property or cause its resale on account of its subsidy lien, but, as I understand, it is not.

The question is whether, under these circumstances, this foreclosure and sale transferred the railroad and telegraph line and property, discharged from the various obligations, conditions, and requirements provided by these acts of Congress as to the operation and use of this property, and especially the requirement that a portion or the whole of the amounts due from time to time from the Government for transportation service over this road and telegraph shall be applied in part payment of the subsidy bonds.

The answer to this depends mainly upon the proper construction of various portions of these acts of Congress, in the light of their obvious purpose and object, and upon whether these provisions merely created a personal obligation upon the company constructing the railroad and telegraph under these acts, and receiving the grants of bonds, lands, and other benefits in aid thereof, or whether, on the other hand, these requirements extended also to the property itself and its use, in whosoever hands it might be.

In the first case the purchaser, whether at a forced or voluntary sale, would take the property free and discharged from these requirements; in the second the purchaser would take the property subject to these provisions, and

would be as much bound to comply with them as was the original company. A glance at these provisions will help to an answer.

The object, intent, and purpose of this Pacific Railroad legislation are obvious, and are also expressed in these acts.

Besides the general benefit to the nation and the people resulting from the opening up to settlement, cultivation, and use of this vast domain of the United States west of the Missouri River, there were certain other objects and purposes intended to be secured by these acts, and expressed therein, and provision therefor made. Some of these were of a permanent character, of indefinite duration, and the provisions for their attainment are equally permanent; and some had relation to a certain object, and the provisions for its attainment continue until that end is reached.

Among the former are, as expressed in the title to the act approved July 1, 1862 (12 Stat., 489), and in other acts upon this subject, "to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean, and to secure to the Government the use of the same for postal, military, and other purposes."

The provisions requiring these companies to furnish communication and transportation over these lines when required, and giving to the Government a preference in the use of the railroad and telegraph lines for communication and transportation, and at rates not to exceed those paid by private persons for like services; and the requirement that these railroad and telegraph lines shall be kept constantly in repair and use, and that the whole line of the respective railroads and telegraphs and the branches (of which the road here in question is one) shall be operated, as far as the Government and the public are concerned, as one continuous line of railroad and telegraph; the provision that any other railroad company may connect its road with those authorized by these acts, upon just and fair terms; the provision that whenever the net earnings of a railroad and telegraph line exceed 10 per cent the Congress may reduce the rates to be charged; and the provisions intended to prevent a monopoly, requiring the companies to permit connections of other telegraph lines and to afford facilities for tele-

graphing over railroad lines of telegraph—all these and other requirements and provisions of these acts of Congress are clearly permanent in character, of indefinite duration, and are not discharged by any alienation of the property, but go with it into whosoever hands it may go, and are equally obligatory upon every owner.

Of the other class, those intended to secure an object not necessarily permanent, and which, therefore, continue only until that end is attained, are those relating to the repayment of the vast sums advanced by the United States in aid of the construction of these railroad and telegraph lines and branches thereof; such as the provision of section 5 of the act of July 1, 1862, that the issue and delivery of these bonds shall, *ipso facto*, constitute a first mortgage upon the railroad and telegraph line and property; that in section 6, that the grants of lands, bonds, etc., are upon the condition that the railroad companies shall pay these bonds at maturity; that in section 6, after the roads are completed at least 5 per centum of the net earnings shall be annually applied in payment of these bonds and interest, and the provision of section 6, here in question, that, "all compensation for services rendered for the Government shall be applied to the payment of said bonds and interest until the whole amount is fully paid."

By section 5 of the act of July 2, 1864 (13 Stat., 356), this was amended so as to require but one-half of such compensation to be thus applied.

By section 13 of the act of July 1, 1862, before referred to, the Hannibal and Saint Joseph Railroad Company was authorized to construct and operate this railroad from Atchison 100 miles westward in Kansas, "upon the same terms and conditions, in all respects," as are provided for the Union Pacific Railroad Company. This is, in substance, the usual form of expression adopted in these Pacific railroad acts, for granting to the several other railroad companies the same benefits, privileges, and immunities that are conferred upon the Union Pacific Railroad Company by this act and the acts amendatory of and supplemental thereto, and for imposing upon them the same obligations, limitations, and conditions. And there can be no question that

the Atchison and Pike's Peak Railroad, and also by the name of Central Branch Union Pacific Railroad Company, in accepting the assignment from the first-named company, and constructing the railroad and telegraph thereunder, and under and in pursuance of these acts of Congress, and in accepting the grants of lands, bonds, franchises, and privileges thereby conferred in aid of such construction, succeeded also to and had imposed upon it all the obligations, limitations, and conditions of said acts, so far as applicable to said assignee company, including these provisions for the application of compensation for services for the Government, toward the payment of these subsidy bonds.

The question, therefore, is whether this foreclosure and sale have operated to transfer the railroad and telegraph and property to the purchasers free and discharged from this requirement as to the application of one-half of this compensation, or whether the purchaser and the property are still bound thereby.

And this, as before said, depends upon whether it is the mere personal obligation or requirement of the company building the road.

It will be noted that this provision is alike applicable to all the bond-aided railroads provided for by these acts of Congress—main lines and branches—and is generally made so by the same general provision in each case, that the company is authorized to construct its road upon the same terms, conditions, etc., as are provided in the case of the Union Pacific Railroad Company, and was intended as a partial security for the hundreds of millions of dollars invested by the United States in these uncertain and hazardous enterprises, in aid of corporations which might become insolvent, and any one of which might sell and transfer its road and property.

It can not be conceived that Congress in providing a security for these vast sums should intend one so precarious as would be this, and the one requiring 5 per cent of the net earnings to be applied upon these bonds, and the one making the payment of the bonds at maturity a condition of the grants made if the company building the road could, after receiving all the bonds and lands, transfer the property so

that it and the purchaser would be absolved from each and all of these obligations and requirements.

For it will be observed that if the sale in this case can have any such effect it is *because the sale itself, proprio vigore*, does this, and not at all because of the reason or occasion of the sale or of whether it was forced or voluntary.

By comparing the language of these acts making provisions for the operation of the railroad and telegraph lines for the right of the Government to use them, at fair rates, obliging the companies to transport the mails, troops, public stores, supplies, etc., giving the Government a preference in the use of the lines, requiring them to be operated as one continuous line, and other provisions before alluded to, which are unquestionably permanent, not discharged or dispensed with by alienation, but following the property into whosoever hands it may go, with that used in the special provisions under consideration, it will be seen that there is nothing in this language to warrant the claim that these special provisions intended as security are any less permanent or more affected by alienation, so long as the debt is unpaid, than are the other class first referred to.

In each case the nature and reason of the requirement mark its duration, the one permanent, because the necessity for it is permanent, and the language indefinite as to duration, the other, until the debt is paid, because the necessity for it has that duration.

But however certain it is, upon general considerations, that this application of compensation is to continue until the bonds are paid, it is made absolutely so by the express provisions of the statute. Section 6 of the act of July 1, 1862, referred to, provides, "And all compensation for services rendered for the Government shall be applied to the payment of said bonds and interest *until the whole amount is fully paid.*"

It will be noticed, also, that this provision is not, in form, the personal obligation or requirement of any particular company or person, nor does it, in terms, impose any obligation upon any particular company or person, but simply requires that the compensation, by whomsoever earned, shall be thus applied. It is not so much a personal obliga-

tion or requirement, as one *in rem*, directing how certain earnings of a property, largely the creation of the Government, and largely under its control, shall be applied, and has no reference to the particular person whose earnings they are.

The express command of the statute is that this application shall continue "until the whole amount is fully paid." This is, of course, conclusive that the sale of the property is not to stop such application. This would be to fix a limit for such application different from that fixed by the statute, but irrespective of sales, forced or voluntary, so long as it is a railroad and telegraph line, and renders service for the Government, one-half of the compensation for such service, no matter by whom earned, must be thus applied, "until the whole amount (of the bonds) is fully paid."

To still further show that this is not the mere personal obligation or requirement of the company building the road, it may be pointed out that, if it were, the provision would require an impossibility, for it requires an application of earnings with which, in case of sale, the seller would be without power or right to comply.

The provision for this application of compensation is a part of the same sentence of the same section which requires the performance of the service. The provision is that the grants in aid of construction "are made upon the condition that said company shall * * * at all times transmit dispatches over said telegraph line; and transport mails, troops, and munitions of war, supplies and public stores, upon said railroad for the Government, * * * and all compensation for services rendered for the Government shall be applied to the payment of said bonds and interest until the whole amount is fully paid." Thus the whole provision for the service and its compensation is an entirety, and if the obligation to perform the service is not discharged or dispensed with by a sale, no more is the requirement as to the compensation therefor. No rule of construction would admit of it.

But the question would seem to be put at rest by section 15 of the act of July 1, 1862, which provides that "Wherever the word 'company' is used in this act it shall be construed

to embrace the words 'their associates, successors, and assigns,' the same as if the words had been properly added thereto."

Under this provision and independently of the general considerations stated, which are also sufficient to the same conclusion, the present owner under this foreclosure sale is the successor and assignee of the Central Branch Union Pacific Railroad Company and, equally with that company, bound by the statutory requirement that one-half of the compensation for services rendered for the Government upon that railroad and telegraph line shall be applied upon the bonds issued in aid of the construction of that line until they are fully paid.

It is not necessary to enter upon a discussion of what would have been the effect of this decree and sale upon this requirement had the United States been a party thereto, and the bond debt still unpaid.

From the whole of this Pacific legislation, it is apparent that, with reference to these bond-aided railroad and telegraph lines and branches, largely the creation of Congress for national and public purposes, and in fixing the terms and conditions upon which it made the immense grants in their aid, Congress made very general provisions for the management and operation of these great roads, and all of which are without any reference whatever to any particular company which may, for the time being, own or operate such lines, but having relation only to the operation and management of the lines, no matter by whom. Such are the provisions to which I have referred, including that for the application of compensation for services for the Government. These relate to the operation and management of the property itself and to the disposition of a portion of its earnings, go with it where it goes, and are at all times applicable, no matter who may own the property, and anyone purchasing must take the property subject to the burdens imposed by such a well-known public statute.

Section 2 of the act of May 7, 1878 (20 Stat., 56), the Thurman Act, requires that the whole compensation for services rendered for the Government by the companies named in this act shall be retained, and one-half thereof be

presently applied to the interest of the subsidy bonds, and the other half turned into the sinking fund provided by that act. But I am of opinion that this section applies only to the companies named in that act, and does not apply to this case; and that in this case only one-half of such compensation should be withheld and applied upon said bonds, as provided by section 2 of the act of July 2, 1864 (13 Stat., 356).

I have, therefore, to advise you that one-half of the compensation due from time to time for services rendered for the Government over the railroad and telegraph line referred to in your communication should be withheld and applied upon the bonds issued by the United States in aid of the construction of that railroad and telegraph, notwithstanding said foreclosure and sale.

Respectfully,

JOHN W. GRIGGS.

The SECRETARY OF THE TREASURY.

DECLARATIONS—STATUTORY CONSTRUCTION.

The Treasury Department has no authority to insist that declarations upon goods obtained by purchase under section 3 of the act of June 10, 1890, shall contain the further clause declaring that the prices in the invoice represent the actual foreign-market value on the day of shipment, etc.

The Secretary of the Treasury can not, by his regulation, alter or amend a revenue law so as to insert into the body of the statute a limitation which Congress did not think it necessary to prescribe.

No mere omission or failure to provide for contingencies, for which it might have been wise to provide specifically justifies any judicial or executive addition to the language of a statute.

DEPARTMENT OF JUSTICE,

March 22, 1899.

SIR: I have the honor to acknowledge the receipt of your communication of October 29, 1898, in which you quote from the provisions of section 3 of the customs administrative act of June 10, 1890, providing, among other things, for the contents of the declaration required to be signed by the purchaser of imported goods, or his representatives, and state the form of declaration in cases of purchased goods as

prescribed by the consular regulations (Form No. 138). You call my attention to the distinction made by said section 3 of the act aforesaid as to the form of declaration required in the case of purchased goods from that prescribed for goods obtained in any other manner than by purchase. You further state that in regard to purchased goods it has been observed by your Department that, in the lapse of time often occurring between purchase and shipment, it frequently happens that the market price of the merchandise (which, when required to be ascertained, is by sections 10 and 19 of the act of June 10, 1890, the open market value of the merchandise at the time of shipment) has either advanced or fallen since the date of purchase. It therefore happens that while the shipper may in his declaration correctly state the price for which the merchandise has been sold, such price is nevertheless not in harmony with the actual market price on the date of shipment.

You inquire whether, in order to protect the Government and to safeguard the importer against penalties for undervaluation, you may properly insist, consistently with the specific provisions of section 3 of the act of June 10, 1890, upon the addition to declarations for purchased goods of a clause declaring that the prices contained in the invoice represent the actual foreign market value on the day of shipment, except as noted therein.

The language of section 3 of the said act requires the declaration to set forth "that the invoice is in all respects correct and true, * * * and that it contains, if the merchandise was obtained by purchase, a true and full statement of the time when, the place where, the person from whom the same was purchased, and the *actual cost thereof* and of all charges thereon * * * and when obtained in any other manner than by purchase, the actual market value or wholesale price thereof at the time of exportation to the United States in the principal markets of the country from whence exported," etc. This is a specific and detailed provision of the law that when merchandise is obtained by purchase, the declaration shall state the actual cost thereof and of all charges thereon, without requiring any additional statement as to value; and, when obtained in any other man-

ner than by purchase, shall state the actual market value at the time of exportation.

I am of opinion that the question is governed by the principle announced in the case of *Morrill v. Jones* (106 U. S., 466), in which the court held that the Secretary of the Treasury can not, by his regulations, alter or amend a revenue law so as to insert into the body of a statute a limitation which Congress did not think it necessary to prescribe. This is not a matter of detail in regard to the execution of customs laws, which the Secretary of the Treasury has authority to regulate under section 251 of the Revised Statutes, as was held to be the case as to the question raised in *Payson v. United States* (38 U. S. App., 226). That section only extends to the prescribing of forms, rules, and regulations not inconsistent with law. Nor is my view contrary to the opinion of my predecessor (21 Opin., 571), holding that under section 249, Revised Statutes, the Secretary of the Treasury has power to prescribe rules and regulations for the collection of duties on imports, and that the manner in which the oaths of declarants on invoices shall be taken under sections 2 and 3 of the act of June 10, 1890, is rather matter of regulation than of statutory construction. The language of the statute in that case clearly justified this conclusion, whereas in the present case the language leaves no room for a regulation which would amount to an amendment or alteration.

In the case of *United States v. Goldenberg* (168 U. S., 95) the court say:

"It is true there are cases in which the letter of the statute is not deemed controlling, but the cases are few and exceptional, and only arise when there are cogent reasons for believing that the letter does not fully and accurately disclose the intent. No mere omission, no mere failure to provide for contingencies, which it may seem wise to have specifically provided for, justify any judicial addition to the language of the statute."

This reasoning applies equally to an executive addition to a statute.

I am therefore of the opinion that it is not within the authority of your Department to insist that declarations

upon goods obtained by purchase under section 3 of the act of June 10, 1890, shall contain the further clause set forth in your communication.

Very respectfully,

JOHN W. GRIGGS.

The SECRETARY OF THE TREASURY.

CUBA—CABLES.

The grounding of a cable upon the soil of the United States, with the intention of connecting our territory with foreign territory by that means, is a matter which is under the sovereign control of the Government.

The application of the Commercial Cable Company for leave to land its cable in the United States is within the jurisdiction and control of the Department of State, acting for the President.

So far as the landing of a cable in the island of Cuba is concerned, the subject is under the control of the War Department, by reason of the fact that its occupation is that of a military nature.

Owing to the temporary nature of the occupation of the island of Cuba by the United States, it is inexpedient to grant permission to the Commercial Cable Company to land a cable upon the soil of Cuba.

DEPARTMENT OF JUSTICE,

March 25, 1899.

SIR: I have the honor to acknowledge receipt of a communication from you, under date of February 27, 1899, with which you inclose to me an application made by the Commercial Cable Company of the United States for permission to land a submarine cable in Cuba and Puerto Rico, for the purpose of effecting cable communication between those islands and the United States, as to which you request my opinion in respect to the power of the Secretary of War in the premises.

The views of this Department upon the subject of landing foreign submarine cables upon the territory of the United States are fully expressed in the opinion of the Solicitor-General, acting as Attorney-General, under date of January 18, 1898, to which you are respectfully referred. The substance of this opinion is that the grounding of a cable upon the soil of the United States, with the intention of connecting our territory with foreign territory by that means, is a

matter which is under the sovereign control of this Government, such control to be exercised by Congress, provided it legislates upon the subject, and, in the absence of such legislation, to be regulated and controlled by the executive department of the Government.

Congress having failed to take jurisdiction and pass any statutes governing the subject, the matter has heretofore been regulated by Executive permission, revocable either at the will of the President or by subsequent legislation by Congress.

So far as the application of the Commercial Cable Company for leave to land its cable in the United States is concerned, the matter is properly, under the practice heretofore established, within the jurisdiction and control of the Department of State, acting for the President. So far as the landing of a cable in the island of Cuba is concerned, the subject is under the control of the War Department, by reason of the fact that the United States is exercising in the island of Cuba administration under the law of belligerent right, its occupancy being of a military nature and merely temporary.

In all instances heretofore where application has been made to this Government, exercising the temporary control and government of the Island of Cuba, for grants or concessions which usually flow from the depositary of sovereign power, the Executive Departments have taken the ground that under the circumstances by which the United States came into temporary administration of affairs in Cuba, and in view of the fact that it is the declared purpose of the United States, when a stable government shall have been there established, to retire from the island and leave the government thereof to the inhabitants, it would be inexpedient to grant such applications, except in case of absolute necessity.

In an opinion rendered to you on January 19, 1899, relative to the claim of Michael J. Dady & Co. as to certain contractual relations between them and the city of Havana, relative to sewerage and paving the said city, I said:

“The importance of the matter involved and the difficulty of understanding the rights and interests of the people of Havana with reference thereto are sufficient and conclusive

reasons for such a course. The administration of the United States in Cuba is of a military nature, and merely temporary. No action binding the island or any of its municipalities to large expenditures and continuing debt ought to be made except upon grounds of immediate necessity, which in this case do not appear to be present.

"Whether the claims of Dady & Co. are well founded, whether they are sufficiently complete to constitute a contractual relation, and whether the authorities of Havana ought ultimately to recognize and confirm them are questions which ought to be left to the decision of the authorities of Havana, not while that city is in the disturbed and partially disorganized condition consequent upon a recent war and a change of national sovereignty, but when it shall hereafter have resumed its normal functions under such conditions of order and tranquillity as will permit its authorities to deal intelligently and justly with the subject."

By Executive order, promulgated by the general commanding the United States forces in Cuba, all grants and concessions of franchises and similar rights have been forbidden to be made by any authority in the islands except upon the approval of the Secretary of War.

This cautious and conservative policy is sustained by considerations of prudence, and by a proper regard for the reversionary rights of the future government of the island of Cuba. In affirmation of the Executive policy so declared and followed, Congress, by act approved March 3, 1899, directed that no property, franchises, or concessions of any kind whatever shall be granted by the United States, or by any military or other authority whatever, in the island of Cuba during the occupation thereof by the United States. (See act making appropriation for support of the Regular and Volunteer Army for the fiscal year ending June 30, 1900, section 2.)

While not meaning to concede that Congress, by legislative act, has power to restrain or control the proper exercise of the powers of the Commander in Chief of the Army and Navy of the United States, occupying, under the law of belligerent right, foreign territory—a question that may well be open to doubt—yet the expressed will and desire of

the Congress, conforming as it does to the previously established policy and practice of the Executive Departments, is entitled to the respect of the Executive Departments, and ought to be followed, unless some high necessity requires otherwise.

You are therefore advised that it would be inexpedient, under all the circumstances, to grant permission to the applicant in this case to land its cable upon the soil of Cuba.

Inasmuch as the permission to land its cable upon the soil of Puerto Rico seems to depend upon the grant of a similar right as to the island of Cuba, the same order should be made with reference to that part of the application, although the circumstances under which the United States retains control and government of the two islands are materially different.

The conclusion which I have arrived at renders it unnecessary for me to discuss or decide the objections raised on behalf of the Western Union Telegraph Company, lessee of the International Cable Company of New York, which companies claim an exclusive grant under a concession from Spain made in 1867, which exclusive grant, it is claimed, has not yet expired.

Very respectfully,

JOHN W. GRIGGS.

The SECRETARY OF WAR.

JUDGMENTS—CLAIMS.

Where a judgment recovered against the United States in the Court of Claims has been paid, and is subsequently set aside on the ground of fraud, the money can be recovered, if at all, because of the fraud and not because it is property or proceeds thereof belonging to the United States and now withheld, as contemplated by section 3755, Revised Statutes.

The Secretary of the Treasury has no authority under section 3755, Revised Statutes, to enter into a contract with a private individual for the collection of such money.

DEPARTMENT OF JUSTICE,
March 25, 1899.

SIR: I have the honor to acknowledge the receipt of your letter of March 20, in which you transmit a copy of a letter

from Messrs. Dudley & Michener, attorneys for Mrs. Marie P. Evans, urging upon you the acceptance of a proposition made by her that the Secretary of the Treasury enter into a contract with her for the recovery of certain money paid the syndic of Belocque, Noblom & Co., on a judgment recovered against the United States in the Court of Claims which was afterwards set aside by that court after it had been paid. Messrs. Dudley & Michener contend that you are authorized by section 3755 of the Revised Statutes to enter into the contract with Mrs. Evans which is proposed by her.

The subject-matter regarding which Mrs. Evans proposes to enter into this contract with you is the money which was paid out of the Treasury of the United States to the syndic of Belocque, Noblom & Co. upon a judgment obtained many years since in the Court of Claims, which judgment was rendered upon a claim for the proceeds of certain cotton alleged to have been captured by the forces of the United States during the civil war, the action being brought under the provisions of the act relating to the proceeds of "captured or abandoned property." This judgment was afterwards set aside by the Court of Claims on the ground that it had been obtained by fraud. Messrs. Dudley & Michener, in their letter to you, insist that a proceeding for the recovery of the money which was paid out upon this fraudulent judgment is "in effect and reality for the recovery of the proceeds of captured cotton fraudulently obtained by persons against whom suit must be brought." They also contend, after quoting from section 3755, that "The Secretary of the Treasury is authorized to make contracts and provisions as he may deem for the interests of the Government for the preservation, sale, or collection of any property or the proceeds thereof * * * which ought to come to the United States, or of any moneys, dues, and other interests lately in possession of or due to the so-called Confederate States * * * and now belonging to the United States, which are now withheld or retained by any person, corporation, or municipality whatever, which ought to come into the possession and custody of, or be collected or received by,

the United States," that the money thus paid upon this fraudulent judgment is clearly property of this character.

I can not agree with this contention. The money paid upon the fraudulent judgment referred to can be recovered, if at all, simply because of that fraud and not because it is property or the proceeds thereof belonging to the United States and now withheld or retained by any person, corporation, or municipality whatever, as contemplated by the terms of section 3755. To be sure, this judgment was obtained because of the fraudulent allegation by the claimant that he was the owner of certain cotton which had been captured by the United States forces, as above set forth; but this cotton had long prior been sold by the United States, and the proceeds of that sale were at the time in the Treasury of the United States. Therefore no action was then or has since been necessary to recover the same; and hence I can not see that section 3755 has any more application to the moneys paid out on the fraudulent judgment under discussion than to the moneys paid upon any other fraudulent judgment obtained against the United States. To my mind, there is absolutely no relation between this section and the subject-matter of the action proposed to be brought by Mrs. Evans.

You state in your communication that the Solicitor of the Treasury, under date of January 19, advised you that there was no law authorizing the Secretary of the Treasury to make such a contract as is proposed by Mrs. Evans. I fully concur in this opinion of the solicitor so far as any authority for such a contract is to be found in section 3755 of the Revised Statutes.

Respectfully yours,

JOHN W. GRIGGS.

The SECRETARY OF THE TREASURY.

CENSUS OFFICE.

The appointment of the subordinate officials and employees of the Census Bureau is within the power and discretion of the Director of the Census. The Director of the Census and his subordinates are not subject to the supervision, control, or direction of the Secretary of the Interior.

The Secretary of the Interior is not required to approve the selection of appointees, the plan for taking the census, or of making contracts for supplies, etc.

By section 2 of the act of March 3, 1899, the Census Bureau is made a part of the Interior Department, and as such its accounts are subject to such rules and regulations as the Secretary may prescribe.

The expenditures authorized by the act of 1899, and incurred by the Director of the Census, are proper and lawful, and the Secretary of the Interior should approve them, if it is his duty to do so at all, as a ministerial act, and not as one in which he is to exercise judgment or discretion touching the wisdom or advisability of the expenditure.

A question with reference to the manner of drawing funds from the Treasury, and the administrative examination of the accounts of the officer disbursing them, is one which should be submitted to the Comptroller of the Treasury.

DEPARTMENT OF JUSTICE,

March 28, 1899.

SIR: I am in receipt of your communication of March 9, 1899, in which, after referring to certain provisions of the Revised Statutes of the United States, to section 22 of the act of Congress approved July 31, 1894 (28 Stats., 211), and to the act entitled "An act to provide for the taking of the Twelfth and subsequent censuses," approved March 3, 1899, you request my advice and opinion upon certain questions and matters of doubt and difficulty arising in connection with the execution of the last-mentioned act of March 3, 1899.

For a better understanding of the laws to be considered and of the questions to be answered, I quote from your letter the following:—

"Under section 441, Revised Statutes, United States, the Secretary of the Interior is charged with the supervision of public business relating to the following subjects:

"First: The census; when directed by law.

* * * * *

"Section 444 of the Revised Statutes of the United States, relating to the expenditures of the Department, provides that:—

"The Secretary of the Interior shall sign all requisitions for the advance or payment of money out of the Treasury, upon estimates or accounts for expenditures upon business

assigned by law to his Department; subject, however, to adjustment and control by the proper accounting officers of the Department of the Treasury.'

"Section 22 of the act of Congress approved July 31, 1894 (28 Stat., 211), provides that:—

"It shall be the duty of the heads of the several Executive Departments and of the proper officers of other Government establishments not within the jurisdiction of any executive department to make appropriate rules and regulations to secure a proper administrative examination of all accounts sent to them as required by section 12 of this act before their transmission to the Auditor, and for the execution of other requirements of this act in so far as the same relate to the several Departments or establishments.'

"The act of Congress approved March 3, 1899, a copy of which is herewith transmitted, entitled 'An act to provide for taking the Twelfth and subsequent censuses,' provides:—

"SEC. 2. That there shall be established in the Department of the Interior a Census Office, the chief officer of which shall be denominated the Director of the Census,' etc.

"This act provides specifically for the appointment by the Director of the Census of such appointees and employees as are not required to be appointed by the President (sections 4 and 5); it authorizes that the collection of the information required by the act, by supervisors, enumerators, and special agents, be done under the direction of the Director of the Census. (Sections 6 and 7.)

"The Director is also authorized to prepare population and other schedules, as well as prescribe interrogatories for the purpose of securing information on certain subjects, etc. (Sections 8, 9, 10, 11, and 12.)

"Section 24 of the act provides that the Director of the Census may authorize the expenditure of necessary sums for the traveling expenses of the officers and employes of the Census Office and the incidental expenses essential to the carrying out of this act, as herein provided for, and not otherwise, including the rental of sufficient quarters in the District of Columbia and the furnishing thereof, and the maintenance of the printing outfit in the Census Office.

"Section 25 provides, 'That the Director of the Census is hereby authorized to print and bind in the Census Office such blank circulars and envelopes and other items as may be necessary, and to print, publish, and distribute, from time to time, bulletins and reports of the preliminary and other results of the various investigations required by this act.'

"Section 26 provides, 'That in case the Director of the Census deems it expedient he may contract for the use of electrical or mechanical devices for tabulating purposes,' etc.

"Section 32 provides, 'That for the organization and equipment of the Census Office, to perform the preparatory work necessary to carry out the provisions of this act, the sum of one million dollars, to be available on the passage of this act, is hereby appropriated, out of any money in the Treasury not otherwise appropriated, and to continue available until exhausted. Of said appropriation, such amount as may be considered by the Director of the Census to be necessary for immediate preliminary printing may be expended under the direction of the Public Printer. *And the Secretary of the Interior shall submit to the Secretary of the Treasury, on or before October first, eighteen hundred and ninety-nine, further estimates for the work herein provided for.*'"

The exigency and occasion for the present determination of the questions submitted by your letter arise from the following facts: The Director and assistant director of the Census have been appointed, and the Director has duly qualified and entered upon the discharge of his duties; the appropriation for the census made by section 32 of the act of March 3, 1899, has been passed to the credit of the Secretary of the Interior by the proper officers of the Treasury Department, and is ready to be advanced or paid out upon the requisitions of the Secretary of the Interior, under section 444 of the Revised Statutes, if that section be applicable thereto; appointees and employees in the Census Office not required to be appointed by the President are about to be selected, and ought to be selected at the earliest practicable time; and contracts for necessary supplies and the rental of necessary quarters for the Census Office ought to be negotiated and made, so that the part to be performed by

the Secretary of the Interior in the making of the Twelfth Census, whether by way of supervision, under sections 441 and 444 of the Revised Statutes and the act of July 31, 1894, *supra*, or otherwise, is a question the solution of which should precede any further steps taken toward putting the act of March 3, 1899, in operation.

The questions specifically propounded for my decision are by you stated as follows:

"Is it contemplated by existing law that these various duties imposed upon the Director of the Census by the act of March 3, 1899, are to be performed under the supervision of the Secretary of the Interior; or, in other words, is the latter required to approve the selection of appointees and employees in the Census Office not required to be appointed by the President, to approve the plan formulated for the taking of the census, and to approve contracts for supplies, rental of quarters, etc.?"

"If section 22 of the act of July 31, 1894 (28 Stat., 211), is applicable to the funds appropriated for census purposes, the money provided for the expenses of the Twelfth Census can only be drawn from the Treasury upon the proper requisition of the Secretary of the Interior, and the accounts of such officer as may be selected to disburse these funds must, under the regulations prescribed under section 22 of the act of July 31, 1894 (28 Stats., 211), be submitted to the Secretary for proper administrative examination before being forwarded to the Treasury for final settlement.

"Is the Secretary of the Interior responsible for the proper disbursement of the moneys appropriated by the act of March 3, 1899; and if so, is he vested with such authority as will enable him to exercise a general supervision over their expenditure, and thereby meet the responsibility so placed upon him?"

A comparison of the census act of March 3, 1899, with that of March 1, 1889, shows a very marked difference in the degree of authority conferred, respectively, upon the Secretary of the Interior and upon the Director of the Census, or Superintendent of Census, as that official was called in the act of 1889. The act of 1889 declared specifically that it should be the duty of the Superintendent of Census, *under*

the direction of the head of the Interior Department, to superintend and direct the taking of the Eleventh Census. Section 3 authorized *the Secretary of the Interior* to appoint a chief clerk, a disbursing clerk, and various other clerks and employees, as well as the supervisors of the census in the several States and Territories and the District of Columbia. In many instances the action of the Superintendent of Census is made to depend upon the approval of the Secretary of the Interior, and the expenditures for the officers and employees connected with the taking of the census, and the incidental expenses essential to the carrying out of that act, were placed within the authority of the Secretary alone.

The act of March 3, 1899, omits all these provisions, such as that which declares that the census shall be taken under the direction of the head of the Interior Department; it places the appointment of subordinate officials and employees absolutely within the power and discretion of the Director of the Census; and so far as the expenditure of money is concerned, there is no reference whatever to the approval or concurrence of the Secretary, except that provision contained in the last sentence of section 32, which directs that "the Secretary of the Interior shall submit to the Secretary of the Treasury, on or before October first, eighteen hundred and ninety-nine, further estimates for the work therein provided for." Indeed, the only references to the Department of the Interior contained in the whole act are, first, that in section 2, which declares that there shall be established in the Department of the Interior a Census Office, the chief officer of which shall be denominated the Director of the Census; second, section 28, which provides that the Secretary of the Interior, on the request of the Director of the Census, is authorized to call upon any other department or office of the Government for information pertinent to the work therein provided for; third, that provision of section 29 which directs that the furniture and property used in taking the Eleventh Census shall be inventoried by the proper officers of the Department of the Interior, and a copy thereof filed in the office of the Secretary of the Interior; and, fourth, the provision above referred to, which occurs

at the end of section 32, directing the Secretary of the Interior to submit further estimates.

It will thus be seen that, so far as the direct language of the act is concerned, the operations of the Director of the Census and his subordinates are in no respect made subject to the supervision, approval, control, direction, or modification of the Secretary of the Interior. He is not authorized or directed to approve the selection of appointees and employees, nor to approve the plan formulated for the taking of the census, nor to approve contracts for supplies, rental of quarters, etc. Not being specifically directed by the act to perform such supervision, the question arises as to whether there is any other provision of the general statutes which imposes such power or duty upon the Secretary.

I am unable to find any. Section 441, which is quoted in your letter, specifically declares that the Secretary of the Interior is charged with the supervision of the census *when directed by law*. This phrase "when directed by law" is applied only to that subdivision of section 441 which relates to the census. All other bureaus within the Department of the Interior are subject to the supervision of the Secretary without any qualification. Doubtless Congress had this in mind when it enacted the law of March 3, 1899, and the very marked and material difference in the construction of this act and of the act of 1889 in this respect can not have been without a definite purpose. If Congress had intended that the Secretary should exercise supervision in any general or specific manner over the taking of the Twelfth Census, it is fair to assume it would have so declared, as it had declared in the act of 1889. The absence of such declaration, under the circumstances, leads to the conclusion that no such supervision was intended, and I therefore answer the first question propounded in your letter in the negative.

I come now to a consideration of the second question submitted. Section 22 of the act of July 31, 1894 (28 Stats., 211), makes it the duty of the heads of the several Executive Departments to make appropriate rules and regulations to secure a proper administrative examination of all accounts sent to them as required by section 12 of said act, etc. The Census Bureau, created for the purpose of taking the Twelfth

Census, is, by section 2 of the act, established in the Department of the Interior, and so becomes a bureau of that Department. This would make the accounts of the Census Bureau subject to such rules and regulations as the Secretary of the Interior shall have made, or shall hereafter make, pursuant to the provisions of section 22 of the act of 1894. In your statement, which leads up to the second question, you say that if section 22 of the act of July 31, 1894, is applicable to the funds appropriated for census purposes, the money provided for the expenses of the Twelfth Census can only be drawn from the Treasury upon the proper requisition of the Secretary of the Interior, and the accounts of such officer as may be selected to disburse these funds must, under the regulations prescribed under section 22 of the act of July 31, 1894, be submitted to the Secretary for proper administrative examination before being forwarded to the Treasury for final settlement.

I am not advised as to the scope and effects of the regulations referred to, nor do I deem it within my province, or necessary to the proper answer to your question, to say whether your statement is, in point of law, correct or not, for the reason that that is a matter which would seem to be properly within the province of the Comptroller of the Treasury under that clause of section 8 of the act of July 31, 1894, which provides that disbursing officers, or the head of an Executive Department, may apply for, and the Comptroller of the Treasury shall render, his decision upon any question involving a payment to be made by them, or under them, which decision, when rendered, shall govern the Auditor and Comptroller of the Treasury in passing upon the account contained in said disbursement.

Section 444 of the Revised Statutes directs that the Secretary of the Interior shall sign all requisitions for the advance or payment of money out of the Treasury upon estimates or accounts for expenditures upon business assigned by law to his Department. If it be assumed that, because the Census Bureau comes within the definition of business assigned to the Department of the Interior, it is therefore necessary for the Secretary to sign all requisitions for the advance or payment of money, as specified in section

444, it does not at all follow, in my opinion, that this vests in the Secretary of the Interior such authority as will enable him to exercise in advance a general supervision over the operations and expenditures of the Census Bureau. His duty will be discharged when he is satisfied that the advance required or the payments made and to be approved are for lawful purposes, within the proper scope and meaning of the census act, and such as are proper to be approved and paid. The Director of the Census is given authority to employ the persons necessary to do the work, to purchase supplies and materials, and generally to incur the expenses for which the appropriation is made. Such expenditures as he incurs within this limit are proper and lawful, and upon being satisfied as to their correctness, if it be the duty of the Secretary of the Interior to approve them at all, it will be to do so as a ministerial act, and not as a matter within his judgment or discretion as touching the mere wisdom or advisability of the expenditure incurred.

Very respectfully,

JOHN W. GRIGGS.

The SECRETARY OF THE INTERIOR.

BONDS—SURETY COMPANIES.

The act authorizing the acceptance of bonds and undertakings of surety and fidelity companies does not permit the imposition of conditions and regulations by Government officials relative to the question of charges, etc.

If the laws of a State under which a surety company is incorporated limits the amount of liability to a certain percentage of the capital, which can be incurred on account of any one partnership or association, and if a greater amount of liability is incurred it is to be secured by a collateral agreement of indemnity, such provision is thereby made a part of its charter, and to that extent is it restricted in its dealings with the United States.

DEPARTMENT OF JUSTICE,

March 30, 1899.

SIR: By letter of March 23, 1899, you submit copy of a communication from the chief of the Division of Appointments of your office, in which attention is called to a request of the *Ætna Indemnity Company* to be released as surety

from the official bonds of Thomas A. Lake as collector and disbursing agent of internal revenue for the district of Connecticut, and you request my opinion upon four questions, which are by you stated as follows:

“First. In view of the showing made in the table setting forth the aggregate liability on bonds in this office as compared with total assets of said company, does not the present surety seem to afford better protection on the bonds in question than the one proposed in substitution therefor?

“Second. Should not a limit be fixed to the aggregate liability which any company may incur on the official bonds filed in this office, beyond which limit such company would not be considered acceptable as good and sufficient surety; or is the liability on such bonds to be considered of such a contingent nature as to warrant the acceptance of such company as surety for an indefinite amount? If the former, what ratio should such limit be to the paid-up capital of such company?

“Third. Should a company be accepted as surety on any one bond, the penalty of which exceeds the capital stock of such company? If not, what percentage of the capital stock should be considered a safe limit to which such company might be accepted on a single bond?

“Fourth. Would it be practicable and wise for the Government to fix a minimum premium rate upon official bonds executed to the United States by guaranty companies, all companies, to be excluded from Government business that accepted lower rates?”

With reference to the first question, I suggest that it involves merely a matter of judgment and discretion, and not a question of law upon which it is proper for the Attorney-General to express an opinion.

With reference to the second, third, and fourth questions, I suggest that they likewise contain matters which are entirely matters of judgment and discretion, in so far as any of them are permissible under the law which governs this subject.

The act of Congress which allows the acceptance by officials of the United States of bonds and undertakings of surety and fidelity companies (28 Stats., 279), does not give

either to the Attorney-General or to the officers authorized to accept such bonds any discretion to impose the conditions and regulations suggested by the last three questions contained in your letter. The act directs that every such company, before transacting any business thereunder, shall deposit with the Attorney-General a copy of its charter and a statement of its assets and liabilities, and that if the Attorney-General is satisfied that the company has authority, under its charter, to do the business provided for in the act, and that it has a paid-up capital of not less than \$250,000 in cash or its equivalent, and is able to keep and perform its contracts, he shall grant authority to such company to do business under this act. Practically the two questions to be decided by the Attorney-General before admitting a company as qualified to give bonds to the United States are, that the company has appropriate corporate power, and, that the company is solvent. I do not think he is justified in saying that because a company has entered into bond to an amount greater than the capital stock of the company it is therefore insolvent; nor do I think he is authorized to fix a limit of percentage of capital stock to liability beyond which the company may not go upon a single bond; nor do I think that he has power to prescribe the rates which such company shall charge for such insurance.

With reference to the provision found in the laws of several of the States, relating to surety companies, to the effect that no such company shall incur in behalf or on account of any one person, partnership, association, or corporation, a liability for an amount larger than one-tenth of its paid-up capital, unless it shall be secured from loss thereon beyond that amount by suitable and sufficient collateral agreements of indemnity, I have to remark that if such provision is contained in the act under which any particular surety company is incorporated, and is thereby made a part of its charter, then to that extent it restricts the corporate power of such company in its dealings with the United States Government. If, however, such State statute refers, not to the charter powers, but to the general powers of all companies transacting surety business within the limits of such State, then it is not operative beyond the limits of such State,

and would have no effect in transactions with the Federal Government.

Very respectfully,

JOHN W. GRIGGS.

The SECRETARY OF THE TREASURY.

CONTRACTS—COURT OF CLAIMS.

A claim for profits and expenses incurred in the construction of a pier in the Aqueduct Bridge, Georgetown, D. C., under a contract which was annulled for lack of diligence in prosecuting the work, involves disputed facts, and possibly controverted questions of law, and is properly referable to the Court of Claims under the first clause of §1063, Revised Statutes.

A claim being one which might have been originally commenced in the Court of Claims by the voluntary action of the claimant, is not covered by the proviso to §1063, Revised Statutes.

DEPARTMENT OF JUSTICE,

March 30, 1899.

SIR: I have the honor to acknowledge your communication of the 28th instant relative to the claim of the *Houston Construction Company v. The United States*, now pending in your Department. You state the facts and circumstances of the claim as follows:

That on May 27, 1897, the claimant company entered into a contract with the United States for the reconstruction by the company of Pier No. 4 of the Aqueduct Bridge, Georgetown, D. C.

That after the company had expended considerable money in and about the work agreed to be done, it was decided by the United States engineer in charge that the company had failed to prosecute the work faithfully and diligently, in accordance with the contract, and therefore the contract was thereupon annulled, pursuant to a provision of the same giving the engineer in charge power to annul the contract if, in his judgment, the party of the second part had failed to prosecute the work faithfully and diligently.

That subsequent to such annulment the company presented the Secretary of War a statement of the amount of money so expended by it before said annulment in and

about the work agreed to be done, claiming the same to be \$34,058, and requested to be reimbursed this amount, together with reasonable profits.

That the company claims that prior to the said annulment of the contract the United States engineer in charge ordered that the work be suspended, and that that gave it a right to said reimbursement, with reasonable profits; but the engineer officer denies that he ordered the work to be suspended, or even asked that the whole of it be suspended, though he admits that he requested the company to suspend one part or branch of it, claiming that the contract empowered him to dictate or determine in what order the different branches of the work should be done.

That the Secretary of War rejected the claim on the ground that he had no jurisdiction or authority to adjust or pay the same, and that then the company asked that the matter be transmitted by the Secretary to the Court of Claims, under sections 1063 and 1064, Revised Statutes.

And thereupon you request my opinion on the following questions:

“1. Is the matter one so pending in the War Department as to give the Secretary of War power to refer it to the Court of Claims under the said sections on the application of the claimant?”

“2. Is it one that the Secretary of War is not prohibited from sending to the Court of Claims by the proviso to the said section 1063, to the effect that ‘no case shall be referred by any head of a Department unless it belongs to one of the several classes of cases which, by reason of the subject-matter and character, the said court might under existing laws take jurisdiction of on such voluntary action of the claimant?’”

From the foregoing statement it is clear to me that the claim under consideration involves disputed facts and in all probability controverted questions of law, and as the amount in controversy exceeds \$3,000, it is properly referable by you to the Court of Claims under the provisions of the first clause of section 1063, Revised Statutes, to which you refer. The claim is furthermore one which might have been originally commenced in the Court of Claims by the voluntary

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action of the claimant, and of which said court in that event would have undoubted jurisdiction, hence it is not covered by the proviso of said section 1063, quoted by you in your second question.

The inclosures in your letter of inquiry are herewith returned.

Very respectfully,

JOHN W. GRIGGS.

The SECRETARY OF WAR.

POST EXCHANGE-CANTEEN-INTOXICATING LIQUORS.

The parliamentary history of an act is inadmissible to explain its meaning.

The meaning attached to an act by its framers or by the members of either House of Congress can not control its construction.

No part of an act is to be regarded as meaningless or superfluous if a construction can be legitimately found which will preserve and make it effectual.

It is to be presumed that the legislature means precisely what it says, and the effort of the interpreter should be to give force and effect to every word, paragraph, and section of the act.

The designation of one class of individuals as forbidden to do a certain thing raises a just inference that all other classes not mentioned are not forbidden.

No officer or private soldier can be detailed in the canteen section to sell intoxicating drinks, either directly or indirectly.

Section 17 of the act of March 2, 1899, does not prohibit the sale of intoxicating drinks through the canteen section of the post exchange by parties other than officers and private soldiers.

A license or permission can not be given by the commanding officer to a private person to enter a military reservation for the purpose of selling intoxicating drinks.

DEPARTMENT OF JUSTICE,

April 3, 1899.

SIR: Section 17 of the act entitled "An act for increasing the efficiency of the Army of the United States, and for other purposes," approved March 2, 1899, provides as follows:

"That no officer or private soldier shall be detailed to sell intoxicating drinks, as a bartender or otherwise, in any post exchange or canteen, nor shall any other person be

required or allowed to sell such liquors in any encampment or fort or on any premises used for military purposes by the United States; and the Secretary of War is hereby directed to issue such general order as may be necessary to carry the provisions of this section into full force and effect."

You request my opinion as to whether the statute above quoted prohibits the continuance of the sale of beer by the Government in the canteen sections of the post exchanges, which are organized and maintained at the various army posts and encampments throughout the United States. I presume that by "beer" you mean a particular kind of intoxicating drink, and what I shall have to say will refer to that as well as to other "intoxicating drinks," that being the phrase used by the act in question.

"In practice the Government commissary stores constituting the regulation ration allowed for the soldiers in each company are required by the War Department to be issued by the commissary officer to the commander of the company, and the commander of the company is (by the same authority) required to have prepared for the mess table of the soldiers only such portion of the same as is found to be necessary at the time, and to sell the remainder and thereby constitute a 'company fund' from which to supply the soldiers' mess table with desirable food not contained in the commissary stores drawn by him as regulation rations from the commissary officer as above stated.

"At every post where it is practicable the War Department requires the post commander to institute a post exchange, the capital stock of which to be made up of contributions from the said funds arising out of the said sales of commissary stores and held by the company commanders, as above stated, and known as company funds. The post exchange is an establishment in which all articles are sold such as soldiers usually buy with the money they spend from their pay, and the establishment is divided up into the following sections:

"(a) A well-stocked general store in which such goods are kept as are usually required at military posts, and as extensive in number and variety as conditions will justify;
(b) a well-kept lunch counter supplied with as great a vari-

ety of viands as circumstances permit, such as tea, coffee, cocoa, nonalcoholic drinks, soup, fish, cooked and canned meats, sandwiches, pastries, etc.; (c) a canteen at which, under the conditions hereinafter set forth, beer and light wines by the drink, and tobacco, may be sold; (d) reading and recreation rooms, supplied with books, periodicals, and other reading matter, billiard and pool tables, bowling alley, and facilities for other proper in-door games, as well as apparatus for out-door sports and exercises, such as cricket, football, baseball, tennis, etc.; a well-equipped gymnasium, possessing also the requisite paraphernalia for out-door athletics. At small posts it may be impracticable to maintain all of these sections, but at every exchange there should be no less than two departments: the refreshment, embracing store, lunch counter, and canteen; and the recreation, which includes all the other branches.'

"The net profits arising from the whole business go to the company funds from which the capital stock was contributed as above stated, and then are used with the rest of the funds, of course, to improve the soldiers' mess table. All of these transactions are carried on by the Government through the War Department under a branch of the Army Regulations promulgated as Post Exchange Regulations. Under these regulations it becomes the official duty of certain officers at the post to attend to the general direction of the business affairs of the post exchange, including all its sections, and the Post Commander and other officers are, of course, officially responsible to the Government for the management, discipline, and order of the whole matter. Also, the Post Exchange Regulations provided for enlisted men to be detailed, under certain circumstances, as salesmen, etc., in all sections of the post exchange, including the canteen section.

"Officers in command of camps, forts, reservations, or other premises used for military purposes have usually exercised the authority (when people desired to sell to soldiers) to allow them to come on the premises to do so, or to refuse to allow them such privileges in their discretion, and also to dictate or determine what those should or should not sell who were permitted to come on the premises."

The post exchange, thus organized and conducted, is, in effect, a voluntary association, similar to an unincorporated club, the officers and men composing the garrison constituting the members thereof, and the rules and conduct of the exchange being under the regulation and supervision of the War Department.

The section of the statute referred to consists of three parts or clauses, namely:

First. That no officer or private soldier shall be detailed to sell intoxicating drinks, as a bartender or otherwise, in any post exchange or canteen;

Second. Nor shall any other person be required or allowed to sell such liquors in any encampment or fort or on any premises used for military purposes by the United States;

Third. And the Secretary of War is hereby directed to issue such general order as may be necessary to carry the provisions of this section into full force and effect.

The question to be decided is whether this enactment absolutely prohibits the sale of intoxicating drinks in any manner or by any person in any post exchange or canteen, or whether its effect is merely to modify and regulate sales of intoxicating drinks in those places by discontinuance of the custom heretofore followed of detailing enlisted men as salesmen in the canteens.

In order to solve this question and determine which is the proper construction, it is not permissible to resort to the debates in Congress, nor to refer to any particular remarks made by members of Congress at the time this provision was before that body for action. It is a rule of construction that what may be called the parliamentary history of an enactment is wisely inadmissible to explain its meaning. Its language can be regarded only as the language of the three branches of the legislative establishment, namely, the House of Representatives, the Senate, and the President, and the meaning attached to it by its framers, or by the members of either House, can not control the construction of it. The opinions held or expressed by one or more members of Congress may or may not have been those entertained by the more than 400 members who gave no such expression. The declaration of some and the assumed

acquiescence of others therein can not be adopted as a true interpretation of the statute. (Endlich on the Interpretation of Statutes, p. 41.)

This doctrine of construction has frequently been stated and applied by the Supreme Court of the United States. See *United States v. Freight Association* (166 U. S., 290, 318), where the earlier cases in that court are cited, and the following language is used by Mr. Justice Peckham:

"Debates in Congress are not appropriate sources of information from which to discover the meaning of the language of a statute passed by that body. The reason is that it is impossible to determine with certainty what construction was put upon an act by the members of a legislative body that passed it by resorting to the speeches of individual members thereof. Those who did not speak may not have agreed with those who did; and those who spoke might differ from each other; the result being that the only proper way to construe a legislative act is from the language used in the act, and, upon occasion, by a resort to the history of the times when it was passed."

Another rule of interpretation that must be applied in the construction of this statute is that no part of an act shall be regarded as meaningless or superfluous if a construction can be legitimately found which will preserve it and make it effectual. A construction of a statute which would leave without effect any part of the language should not be made, unless it is otherwise impossible to give a reasonable and consistent construction to the act. It is to be presumed that in enacting a law the legislature means precisely what it says, and the effort of the interpreter should be to give force and effect to every word, paragraph, and section of the act. (Endlich on the Interpretation of Statutes, p. 29.)

If this act was intended to be entirely prohibitory of the sale of intoxicating drinks in post exchanges or canteens, as well as in encampments, forts, and other premises used for military purposes, then, to say the least, Congress used a very circuitous route to reach that point, and employed many superfluous words to enact a simple provision which could have been stated in a single sentence declaring that hereafter no intoxicating drinks should be dealt in or sold in

any post exchange, or canteen, or on any premises used for military purposes by the United States. The act does not make any such declaration. On the contrary, the first clause merely forbids the detail of any officer or private soldier to act as a bartender, or otherwise, in the sale of intoxicating drinks in any post exchange or canteen. Why specify officers and private soldiers as forbidden if it was intended to forbid the traffic by all other persons? The designation of one class of individuals as forbidden to do a certain thing raises a just inference that all other classes not mentioned are not forbidden. A declaration that soldiers shall not be detailed to sell intoxicating drinks in post exchanges necessarily implies that such sale is not unlawful when conducted by others than soldiers. If a statute were to provide that no liquors should be sold to minors in any saloon, would not everyone infer that the enactment was predicated upon a state of law which as to others than minors allowed the sale of liquors in saloons? As all parts of the act must be given effect according to their natural sense and meaning, if possible, it becomes necessary to attach to this first clause, therefore, a signification which implies that the sale of liquor in post exchanges is not unlawful when conducted by others than soldiers. Certainly, standing by itself, it can receive no other or broader meaning than that officers or private soldiers are not to be detailed to sell intoxicating drinks.

But the sale of intoxicating drinks in post exchanges and canteens is not the only method in which those commodities are supplied upon premises used for military purposes. As is stated above, officers in command of encampments, forts, reservations, and other premises have usually exercised the authority to allow persons to come upon the premises and sell intoxicating drinks to soldiers, or have exercised the discretion of refusing such privilege. The second clause would seem to relate particularly to this class of persons and to this custom. Given its full effect, it forbids any such license or permission to be granted hereafter by any military officer. I do not think that the second clause of the section is intended to modify or affect in any way the sale of intoxicating drinks in the post exchanges or canteens. That is dealt with and is covered by the first clause. The second clause relates entirely to a different matter.

Strength is given to this position by the third clause, which directs the Secretary of War to issue such general order as may be necessary to carry the provisions of this section into full force and effect. If the section was intended to be an absolute prohibitory act, preventing the sale of intoxicating drinks on all Government premises occupied for military purposes, then it would execute itself, and would require no general order from the Secretary of War or from anyone else. In the face of a general prohibitory section of that kind such sales would be unlawful, and the order of the Secretary would not in any way enhance their illegality. If, however, that interpretation be adopted which separates the first and second clauses and makes the second refer only to sales by persons not connected with post exchanges or canteens, then the third clause of the section becomes intelligible and appropriate, and applies to the future sales in post exchanges or canteens. The act having forbidden the employment of soldiers as bartenders or salesmen of intoxicating drinks, it would be lawful and appropriate for the managers of the post exchanges to employ civilians for that purpose. Of course, employment is a matter of contract, and not of requirement or permission. The regulation of the post exchanges and canteens being within the power of the Secretary of War, the act means that he shall by order modify the regulations upon that subject so as to make them consistent with the provisions of this act. To that end, it will be requisite that he shall determine the question of the persons who may be employed in the post exchanges, and such other conditions and requirements in connection therewith as his good judgment may dictate.

The result of these reflections is, then, that this section does not prohibit the continuance of the sale of intoxicating drinks through the canteen sections of the post exchanges, as heretofore organized and carried on, except that, of course, no officer or soldier can be put on duty in the canteen section to do the selling, either directly or indirectly. This latter the law clearly prohibits.

Very respectfully,

JOHN W. GRIGGS.

The SECRETARY OF WAR.

NAVY—MEDICAL AND PAY DIRECTORS.

Under section 11 of the naval personnel act the pay director and medical director will be retired with the rank and three-fourths the sea pay of the next higher rank, which is that of a rear-admiral, although this will result in a higher relative rank than that to which they are entitled in the active service.

The highest officer in the Medical Corps being a medical director having the relative rank of captain, it is impossible to promote him to a higher place in such corps, though he may have a higher rank conferred upon him than that of captain.

Officers on the retired list under the provisions of this law, recalled to active duty in case of war, would reenter the active list with the rank and pay of the next higher grade.

DEPARTMENT OF JUSTICE,

April 8, 1899.

SIR: I have the honor to acknowledge receipt of your communication of March 30, 1899, wherein you state that two officers of the Navy, a pay director with the rank of captain and a medical director with the rank of captain, will shortly be entitled to retirement pursuant to the provision of section 1444 of the Revised Statutes, which provides that when any officer below the rank of vice-admiral is 62 years old he shall be retired by the President from active service.

Section 11 of the naval personnel act of March 3, 1899, directs—

“That any officer of the Navy, with a creditable record, who served during the civil war, shall, when retired, be retired with the rank and three-fourths the sea pay of the next higher grade.”

Each of the officers above referred to served during the civil war with a creditable record, and, being entitled to be retired by virtue of the provisions of section 1444, is entitled to the benefit of the provisions of section 11 of the naval personnel act, unless that section ought to be so construed as not to permit an officer of the Medical Corps or Pay Corps who has reached the highest rank in either of those corps from being advanced to a relative rank higher than that of captain. The question which you submit for my decision is whether section 11 of the personnel act is applicable to the cases of the pay director and medical

director above referred to, and whether, in case of their retirement, they are entitled to be retired with the rank and three-fourths of the pay of rear-admiral, which is now the next higher grade to that of captain.

Officers of the Medical Corps on the active list of the Navy have their status in the service fixed by section 1474 of the Revised Statutes, the highest grade being that of medical director, who bears the relative rank of captain. Officers of the Pay Corps on the active list of the Navy have their status fixed by section 1475, the highest officers being the pay directors, who bear the relative rank of captain. In the active list there is no higher relative rank to be attained in either of these corps than that of captain, and the question is whether there is anything in the law or in the constitution of the personnel of the Navy which forbids the application of the literal provisions of section 11 of the personnel act to such officers as medical directors and pay directors.

By your communication you state that doubt arises on this point because, on the one hand, the rank of captain is the highest to which any officer of the Navy in the Pay or Medical Corps can, in the ordinary course of promotion, attain, there being no higher grades on the active list in either of those corps than that of pay director and medical director, respectively, with the rank of captain. You suggest that the officers concerned having, therefore, reached the head of the list in their respective corps, may be regarded as in the same situation as the present rear-admirals on the active list in the line, most of whom served creditably in the civil war, but who, of course, can derive no benefit from the provisions of section 11 of the personnel act, having in regular course of advancement reached the highest grade on the active list of the Navy—with the exception of that of Admiral, which latter grade, it is assumed, need not in this connection be considered. Further, the same general question has arisen with respect to an officer of a lower grade, a chief boatswain, who, under section 12 of the personnel act, is entitled to rank "with but after ensign." A warrant officer having attained such rank can go no higher. He is not, under the law, eligible to appointment as lieutenant,

which is the next higher grade in the line; but if section 11 of the personnel act is applicable to such a case, the chief boatswain referred to, who served creditably during the civil war, is entitled to be retired, with the rank of a lieutenant of the junior grade. You suggest, further, that any officer on the retired list may, in the exigency of war, be recalled to active duty, and in such case would reenter the active list with the rank and pay of the next higher grade, upon which he was retired; that is to say, a boatswain retired as a lieutenant, junior grade, would, if recalled to the active list, be entitled to the rank and pay of a lieutenant, and, likewise, a pay director or a medical director retired as a rear-admiral would, upon reentering the active list, be entitled to the rank and pay of the latter grade.

It is to be noted that the language of section 11 of the personnel act is general, and does not in terms confine its operation to officers of the line. The language is: "*Any* officer of the Navy with a creditable record, who served during the civil war, shall, when retired, be retired with the rank and three-fourths the sea pay of the next higher grade." This act assumes that there must be a higher grade to which the retiring officer can be promoted. Of course, one occupying the highest rank in the Navy could not, by retirement or any other means, be promoted to a higher grade when none exists. The question, however, is whether this promotion must be confined to the grade existing in the particular line of service in which the retiring officer is serving, or whether it refers to the rank or grade of officers of the Navy generally, without respect to the limitations of rank placed upon the different branches of the staff service. The officers of the different corps of the staff, such as the Medical Corps and the Pay Corps, have separate and distinct titles, appropriate to the nature of their service and to their rank in the corps, and in addition thereto are given relative rank by the same title that is applied to officers of the line. The line furnishes the standard of rank for officers of all classes. A captain of the line is merely a captain, and has but one title to designate both his office and his rank. An officer of the staff has an official title to identify his position in his corps, and also a relative rank in addition, the latter

being arbitrarily fixed by Congress to designate his relative rank in the service in accordance with the line standard. The highest officer in the Medical Corps is a "medical director," having the "relative rank of captain." It would not be possible to promote a medical director to a higher place in the Medical Corps, but it would be possible to confer upon him a higher rank than that of captain. And in my opinion that is what section 11 is intended to do. The two officers whose cases are now under discussion will be retired, respectively, as medical director and pay director, but with a higher relative rank on the retired list than that which they are entitled to in the active service, namely, rear-admiral. I see no difficulty in giving to section 11 such a construction, nor do I see any inconsistency or embarrassment that will arise in its operation. It is true, as suggested by you, that officers on the retired list may, in the exigency of war, be recalled to active duty, and in such case they would reenter the active list with the rank and pay of the next higher grade; that is to say, a medical director who had been retired with the relative rank of rear-admiral, if recalled to the service, would enter with the rank and pay of a rear-admiral, but he would enter only in the medical corps and as a medical director. The rank conferred upon a person holding the position of medical director is purely statutory and arbitrary, and I see no reason inconsistent with the scheme of the arrangement of the naval personnel why a retired medical director should not hold a higher relative rank than that which is permitted to a medical director on the active list. I see no good reason to hold that the additional honor and emolument which Congress undoubtedly intended to confer upon officers of the line are not equally applicable to officers of the Navy of like rank in the different corps. That Congress has in other instances contemplated a similar result is apparent from the provisions of section 1481 of the Revised Statutes, which provides that officers of the Medical, Pay, and Engineer Corps, chaplains, professors of mathematics, and constructors who shall have served faithfully for forty-five years shall, when retired, have the relative rank of commodore. This is a provision producing exactly similar results to the one now under consideration, and if any

inconvenience or embarrassment would arise under section 11 from a construction such as I have placed upon it, the same embarrassment and difficulties would arise under the provisions of section 1481.

Very respectfully,

JOHN W. GRIGGS.

The SECRETARY OF THE NAVY.

CONTRACTS—DAMAGES.

Pursuant to a contract entered into by the Secretary of War with certain contractors for the transportation from Lynn Canal to Dawson City of supplies for the relief of destitute people in the Yukon River region, said contractors made preparations for such transportation and incurred therein a large expense. The expedition was subsequently abandoned, because it was found unnecessary, and the contractors were so notified. *Held*, The Secretary of War has power to settle and pay the claims of the contractors out of the appropriation made for such relief.

The Secretary of War had the right to abandon this contract and decline to perform it if he deemed that the public interests so required.

If the Government had ascertained that the contractors were not and could not be ready to transport the supplies within the time agreed upon, it could have treated that as a default and rescinded the contract; but in such case those facts must be shown to have existed.

In the absence of complaint or suggestion of the want of diligence or readiness on the part of the contractors, they must not be treated as being in fault.

A party may abandon, fail, or refuse to perform his contract, but its obligations still continue, although at law there may be no means for their enforcement.

Unless authorized by Congress the head of a Department has no power to adjust and pay claims for unliquidated damages, even when arising from the breach of a contract, except where such claims are for work and labor done or materials furnished under a contract silent as to price and the amount thereof unliquidated.

DEPARTMENT OF JUSTICE,

April 12, 1899.

SIR: I have the honor to acknowledge the receipt of your note of February 1, 1899, with accompanying papers, requesting my opinion whether the claim there referred to, of the Snow and Ice Transportation Company, can be paid by you from the appropriation for the relief of the people in the Yukon River region in Alaska.

The material facts in the case appear to be these: In the early winter of 1897 the Government, with its usual regard for the protection and safety of its people, even when improvidently placing themselves in situations of danger, made provision for a relief expedition in aid of the people in the Klondike and Yukon mining regions in Alaska, and on December 18, 1897, Congress passed an act authorizing the Secretary of War to fit out an expedition for the relief of these people, and to purchase subsistence supplies, transportation, etc., therefor, and to use the Army of the United States in aid of such expedition, and appropriated \$200,000 therefor.

Under this authority the Secretary of War, on December 30, 1897, entered into a contract with Edward I. Rosenfield for the transportation from the head of Lynn Canal to Dawson City, Alaska, of 150 tons of this freight, more or less, at \$500 per ton, and to transport and return the military of such expedition, not exceeding fifty men, their supplies, arms, and equipments, without further charge.

A few days thereafter the Snow and Ice Transportation Company was made a party to this contract, in conjunction with said Rosenfield, and said contractors entered upon preparation for such transportation, and in doing so expended large sums—over \$50,000—in the procurement of engines, machinery, cars, sleds, etc., specially adapted to this purpose and much of which was not adapted to or valuable for any other, and borrowed \$17,000 upon the strength of this contract, and in aid of this preparation.

On March 7, 1898, for reasons apart from any failure or default of the contractors, but because it was found that such expedition was unnecessary, the Secretary of War abandoned both the expedition and the contract, and so notified the contractors, and that they should proceed no further thereunder, and that no freight would be delivered under the contract.

It appears that the first installment of this expedition left Portland, Oreg., on February 5, 1898, by steamer, accompanied by an agent of the contractors to receive and care for the goods at Lynn Canal. It does not appear what became

of this, but, as appears, no freight or men were delivered at the place for transportation.

Under these circumstances the contractors make claim for compensation on account of this contract, their expenditures thereunder, and its breach, and offer to take in full settlement \$16,685.84, a part of the sum they had borrowed, and to execute to the Government a formal and sufficient release of all claims on account of said contract and its breach.

The question is whether the Secretary of War has power to thus settle this claim and pay it from the appropriation made by said act.

There is no claim that this demand of the contractors is not in good faith and meritorious, or that it is too large, if they are entitled to compensation. But in a note to the Judge-Advocate-General, asking his opinion, and in that opinion, it is claimed that the contractors were first in default themselves, in not being ready with means at Lynn Canal for this transportation from February 1 to March 7. I do not so understand the contract. It was, on their part, one for transportation merely of freight expected to arrive on or about February 1, and bound them to transport the freight, after its arrival, as speedily as practicable, and within seventy days after its arrival. The clause is this:

"The said party of the first part will accept the said freight at the said point on the Lynn Canal, store, shelter, and protect it, and transport the same to Dawson City without delay and at the earliest practicable time, and not more than seventy days from date of landing said goods, on or about February 1, 1898, at the head of Lynn Canal."

The nature and object of this contract, the snow and ice covered mountains and passes that had to be traversed, in an Arctic winter, the length of the journey, with the time it required, the need of great expedition, and the necessity for its military escort, all make it manifest that several trips were not intended, nor the sending of the expedition by installments, nor is there anything in the contract to warrant the idea that the contractors were bound to transport the freight in installments or to make more than one trip. They could not, therefore, be placed in default until the

whole, freight and men, had arrived ready to be transported, and this never took place.

It is true, however, that if the Government ascertained that the contractors not only were not, but could not be, ready to perform within the time agreed, it might treat that as a default, and rescind the contract on that ground. But in such case the Government must show clearly that such facts existed. Instead of this, it appears that no complaint or suggestion was ever made of any want of diligence or readiness on the part of the contractors; and we must treat the case as one where the contractors are not in fault, and where the Secretary of War abandoned the contract because the expedition was no longer deemed necessary. That he might properly do this, is apparent from the Corliss case and Satterlee's case, cited later, and from other cases.

This agreement of the contractors for this transportation under these extraordinary circumstances required for its fulfillment special means, and their contract was just as much an agreement to provide the necessary means as it was to transport the freight, and the procurement of these means was a part performance by them of their contract.

The opinion of the Judge-Advocate-General proceeds largely upon the idea that this action of the Secretary of War terminated—put an end to—this contract and its obligations, and that, whatever power the Secretary might have to settle and adjust claims under a subsisting executory contract, he has no such power where the contract has been put an end to and the damages are unliquidated.

It is a mistake to suppose, except where it is expressly so provided, that one party to a contract can, without the consent or default of the other, cancel, rescind, or put an end to the contract or its obligations. The law neither provides nor recognizes any such easy road to repudiation. A party may abandon, or fail, or refuse to perform his contract, but its obligations still continue, although, at law, there may be no means for their enforcement. This is shown by the fact that it is the usual practice of courts of equity to enforce the specific performance of contracts against parties after their breach of or refusal to perform them. This, of

course, could not be done if the obligations of the contract did not continue after breach as before.

The Secretary had the right to abandon this contract and to decline to perform it if he deemed that the public interest so required. The point here made is that this did not put an end to the contract as to its *obligations*. In all such cases there also arises, *ipso facto*, out of the contract and its breach a new obligation, viz, to substitute compensation for performance, and this, the other party may accept and enforce at his option; and this compensation is, theoretically, the pecuniary equivalent of performance, and is in lieu of and in substitution for performance.

It is just as much an obligation arising under the contract as is any other. In effect, it is much as if this obligation were inserted in the contract and the party had there said, "I will do thus and so, or make full compensation if I fail to do it."

The agreement settling the amount of this compensation and its payment constitute the accord and satisfaction favored by the law and upheld by the courts; and this needs no other consideration than the subsisting obligations of the contract, for which this is exchanged as a substitute.

When the Secretary abandoned and declined to perform this contract he assumed the obligation to substitute compensation in the place of performance, and all that was left to be done was to agree upon its amount, for it is impossible that one should have authority to abandon and refuse performance of a contract and not to assume its resulting obligation. Besides this, the obligation is cast upon the party *volens volens*, and with the same effect as if voluntarily assumed.

Has the Secretary of War power to settle and discharge this obligation which he himself has created?

This act of the Secretary, done within his authority, is the act of the Government, and the resulting obligation is the obligation of the Government, and somebody must discharge it.

The Court of Claims has repeatedly held that unless authorized by Congress heads of departments have no power to adjust and pay claims for unliquidated damages, even

when arising from breach of contract. A well-recognized exception is the case of claims for work and labor done or materials furnished under a contract silent as to price, and the amount therefore unliquidated. (Dennis Case, 20 Ct. Cls., 119, and other cases.)

This want of power, when it exists, is not at all because such action would be the exercise of judicial power, which by the Constitution is vested in the courts. It is not perceived that the Government, any more than any other party, in settling with a creditor and allowing a claim against itself is exercising judicial power in any legal sense. Certainly not so that it can, for that reason, repudiate its own settlement. And, *qui facit per alium, facit per se*. And if the act is within the scope of the agent's authority, it is binding without any reference to judicial power, which could not be conferred by mere act of Congress.

Passing for the present the question of the general power of the Secretary under acts of Congress and a course of practice long continued with the tacit assent of Congress, I consider first the statute authorizing this expedition. Without referring in detail to its provisions, it is manifest that by this act the entire expedition, the supplies to be purchased, the transportation to be provided, the military to be employed, contracts to be made, when the expedition should start, or whether start at all—in short, everything pertaining to the expedition was committed to the discretion of the Secretary of War. It is difficult to see that, within the general object of the expedition and the amount appropriated, he did not have all the power and discretion which the Government itself had or could exercise. And it is important to note that the whole of the \$200,000 appropriated was placed unreservedly and absolutely in his hands, to be expended by him just as he deemed best in aid of this expedition.

He could make such contracts as he chose, and perform them or not, as he pleased. He could himself have had made the engines, machinery, snowplows, cars, and sleds, and have hired teams, drivers, and guides, or he could have contracted with these contractors, as he did for the transportation, in a lump. He could expend the whole or any part of the sum appropriated, with no other restriction than

that it should be for the purpose of the expedition; and it would seem impossible to say that, with this absolute and unlimited power to expend this money, he could not use it to pay for contracts that he had rightfully made and rightfully broken in aid of the very purpose for which it was appropriated.

This money was appropriated for the very purpose of paying all expenses and obligations of the expedition, and he was made the one to decide how and for what it should be paid; and to say he could not do so is to deny the power so explicitly given him.

Under this statute there would seem to be no possible question of his power. He had all the power that there was or that could be conferred; there was no limit to it, save to keep within the general object of the expedition, nor could he be called to account for his expenditure of the money, save only for deviation from the general purpose of the act, gross neglect, or fraud.

The question of liquidated or unliquidated damages is wholly foreign and irrelevant, and cuts no figure. The statute gives him the absolute power to spend the money as he deems best, and nowhere makes any limitations as to liquidated or unliquidated claims. It authorizes him to make and pay for such contracts as he chooses, and pay for their performance in whole or in part, and, if he finds that the further performance of a contract is not best for the public interest or for the purpose of the appropriation, he may abandon it and pay the damages, just as, and by the same authority as, he would pay for full performance, and with no more reference in the one case than in the other to whether the claim was liquidated or not.

This was not only within his power, but was his plain duty. Congress gave him this money with which to settle and pay all the expenses of and claims arising from this expedition, and made him the sole judge of how it should be expended, and for what it should be paid, and he had no right to leave any claim unpaid which could be fairly adjusted and paid, nor, except to take the opinion of legal advisers, to refer back to the Government or leave to it to decide that which

had been intrusted to him for decision, viz., what claims of his making should be paid.

The fact that the claim is an unliquidated one is all that is urged here or in the reported cases against the power of the Secretary to settle and pay. Passing as not important the question whether in this case it appears that the claim is of this character, it is entirely certain that this question can cut no figure here. Whatever effect this may or may not have upon the general power of heads of departments, the power in this case is given by express statute, and that power clearly is to expend the whole or any part of the sum appropriated for such purposes in aid of the expedition as, in the judgment of the Secretary, would best subserve the purpose for which it was appropriated, and the claim that under this absolute discretion and power of disposal he could pay liquidated but not unliquidated claims is without any foundation whatever. The important fact, and the one which settles the whole matter, is this: The statute authorizes him to expend this money *entirely at his own discretion*, in aid of and within the general purpose of the appropriation, and because this is so, and because the statute has not restricted him to the payment of liquidated claims, he is clearly not so restricted. And this discretion thus given by statute is one which no court can interfere with or control.

Independently of this statute and upon principle and authority the same conclusion would be reached.

I shall not enter upon what is the legal and logical result of the fact that Executive Departments, with their heads, are not mere agents of the Government, with no power except such as is expressly conferred, but are, on the contrary, parts of the Government itself, of the executive and coordinate branch of the Government, and their acts, when executive, are the acts of the Government itself. Conclusions resulting from this might not be in harmony with the distinction which permits the executive branch of the Government to break a contract when it is for the interest of the Government, and to pay the other party if there is an appropriation for the damage thus done, if that be liquidated, and to leave him to petition Congress for relief, or

for power to sue the Government, if the claim for damage should be unliquidated. The consideration of this is not necessary here.

In the case of *United States v. Corliss Steam-Engine Company* (91 U. S., 321), the Secretary of the Navy had made contracts for engines and machinery to be placed on one of our vessels of war, but before the work was completed, the war being closed, the Secretary suspended the further performance of the contracts. The contractor proposed that in settlement of the whole matter he would retain the uncompleted engines and machinery and accept \$150,000, or he would deliver the work in its uncompleted state and accept \$259,068 in full settlement. The Secretary accepted the latter proposition, and there being no appropriation therefor, gave the contractor a certificate for this sum, and the Supreme Court upheld the settlement and expressly decided that it was within his power.

It will be observed that in such a case there were necessarily involved claims for damages of an unliquidated character, and as this was the proposition of the contractor it is quite safe to assume that it embraced all his claims, unliquidated as well as liquidated, or, at least, such sum as he was willing to accept in settlement of all his claims of any character. It will be noted also that the powers and discretion of the Secretary of the Navy, under the acts of Congress referred to by the court, are by no means as broad as those conferred upon the Secretary of War by the act here under consideration. The court said (p. 3222, 3223):

“As, in making the original contracts, he must agree upon the compensation to be made for their entire performance, it would seem that when these contracts are suspended by him he must be equally authorized to agree upon the compensation for their partial performance.”

This is a statement of the principle which underlies the whole matter.

It will be further noted that the court, in its opinion, makes no allusion whatever to liquidated or unliquidated damages or claims, nor to whether the power of the Secretary was affected by any distinction between them, although if that was deemed important, this was a fair case for its consideration.

The case must, it would seem, be taken to repudiate this distinction as affecting the heads of departments, unless it proceeded upon the idea that the Secretary might follow the course adopted by courts of equity, which, having obtained jurisdiction of a cause on account of matters within their jurisdiction, retain it to dispose of the whole case, although some of the matters decided would not themselves have been within their jurisdiction. And it would seem not unreasonable that such officers, having jurisdiction to settle a portion of such a claim, might proceed to do full justice to the party they had injured for the public good, and settle the whole claim instead of a portion of it, even though some of it might be technically unliquidated.

But, however this may be, the Supreme Court in that case holds that the head of a department has power to settle the claims for damage resulting from his abandonment of his contracts, and the same doctrine is applicable to this case.

The same doctrine was later held in *Satterlee's Case* (30 C. Cls., 31).

But it is suggested that, even if the Secretary has power to adjust this claim, still he has no power to pay it from the appropriation made by the act referred to, inasmuch as that is an appropriation "for the relief of people who are in the Yukon River country," and the payment of this claim contributes nothing to their relief.

The Secretary is authorized to expend this money in such manner and for such purposes as he may think most conducive to the relief intended, and his power to pay claims which he has made or caused does not at all depend upon the fact that that for which he has contracted actually reached these people or actually contributed to their relief, and paying for what was intended for their relief is quite within the intent of the act, even though it never reached them. It is much too fine a casuistry for practical everyday use which distinguishes between paying for the relief of a people and paying for what was intended to relieve them. Certainly no such questions can affect the power of the Secretary under this statute.

I have therefore to advise you that the Secretary of War has power to settle and to pay from the appropriation referred

to the claims of the contractors under this contract for transportation and for its breach.

Respectfully,

JOHN W. GRIGGS.

The SECRETARY OF WAR.

STAMP TAX—"PUTS"—"CALLS."

The written evidence of a transaction called in brokers' parlance a "put," being an agreement on the part of the signer to buy stock, the opportunity to purchase being entirely dependent upon the disposition of the bearer, or the party to whom the paper is given, is not taxable under the war-revenue law.

A writing termed a "call," in which the signer agrees to sell the stock described in the paper at the price named, provided the holder of the paper calls upon him within the time specified, is taxable under the first paragraph of schedule A of the war-revenue law.

DEPARTMENT OF JUSTICE,

April 27, 1899.

SIR: In yours of December 5, 1898, the receipt of which I have the honor to acknowledge, you inclose two exhibits, marked respectively "A" and "B," and you request my opinion as to whether the instruments of which these exhibits are copies, when used as evidence of transactions by brokers, are required to be stamped under that paragraph of schedule A of the war-revenue act, which is as follows:

"Contract: Broker's note, or memorandum of sale of any goods or merchandise, stocks, bonds, exchange, notes of hand, real estate, or property of any kind or description issued by brokers or persons acting as such, for each note or memorandum of sale, not otherwise provided for in this act, ten cents."

Exhibit A is a copy of the written evidence of a transaction called, in broker's parlance, a "put," and is after this form:

"NEW YORK, *November 21, 1898.*

"For value received, the bearer may deliver me, on one day's notice, except last day, when notice is not required, one hundred shares of the capital stock of the Chicago, Burlington and Quincy R. R. Company, at one hundred and seventeen (117) per cent, any time in seven days from date.

"All dividends for which transfer books close during said time, go with the stock.

"In consideration that the foregoing 'put' is made to run to 3 p. m. the right to put same 'cash' is not permitted.

"Expires November 28, 1898, 3 p. m.

"JOHN DOE."

Exhibit B represents the writing used in what is termed a "call" and reads thus:

"NEW YORK, *Nov. 21, 1898.*

"For value received, the bearer may call on me on one day's notice, except last day, when notice is not required, one hundred shares of the capital stock of the Chicago, Burlington and Quincy R. R. Company, at one hundred and twenty-three (123) per cent, any time in seven days from date.

"All dividends for which transfer books close during said time, go with the stock.

"In consideration that the foregoing 'call' is made to run to 3 p. m. the right to call same 'cash' is not permitted.

"Expires November 28, 1898, 3 p. m.

"RICHD. ROE."

The transactions represented by the two exhibits are certainly not taxable under the provision of law above quoted, because neither of them can be construed as a broker's note or memorandum of a sale. They do not evidence a sale completed, nor can they be construed as executory contracts for sales to be completed subsequent to their making.

I am of the opinion that Exhibit A is not taxable under any provision of the war-revenue act, for it is an agreement on the part of the signer to buy stock, but the opportunity to buy is entirely dependent upon the disposition of the party (the bearer) to whom the paper is given. There is no provision of the war-revenue act, so far as I can find, which taxes such a transaction.

I take a different view, however, of Exhibit B. In that case the signer agrees to sell the stock described in the paper at the price named, provided the holder of the paper calls upon him within the time specified. I think this transaction is subject to the tax provided under that portion of

the first paragraph of schedule A of the war-revenue act, which reads as follows:

“and on all sales, or agreements to sell, or memoranda of sales or deliveries of transfers of shares or certificates of stock in any association, company, or corporation, whether made upon or shown by the books of the association, company, or corporation, or by any assignment in blank, or by any delivery, or by any paper or agreement or memorandum or other evidence of transfer or sale, whether entitling the holder in any manner to the benefit of such stock, or to secure the future payment of money, or for the future transfer of any stock, on each hundred dollars of face value or fraction thereof, two cents.”

It is true that the completion of this transaction depends upon whether the bearer elects to buy the stock described within the time and at the price named, but very certainly the maker agrees to sell, provided the bearer comes forward and requires it.

Very respectfully,

JAS. E. BOYD,

Assistant Attorney-General.

Approved.

JOHN W. GRIGGS.

The SECRETARY OF THE TREASURY.

NAVY—ENGINEER OFFICERS.

Engineer officers who attained the relative rank of commander prior to the passage of the personnel act became entitled, under the first sentence of section 2 of the act, to take that actual rank in the line of the Navy.

DEPARTMENT OF JUSTICE,

May 3, 1899.

SIR: Under date of February 24, 1899, Chief Engineer George H. Kearny, United States Navy, attained the relative rank of commander, and was duly notified that he would be “regarded and recognized as holding” such relative rank from that date.

On March 3, 1899, Congress passed an act “to reorganize and increase the efficiency of the personnel of the Navy and

Marine Corps of the United States," which provided in its first section "that the officers constituting the Engineer Corps of the Navy be, and are hereby, transferred to the line of the Navy, and shall be commissioned accordingly."

The second section of this act reads as follows:

"That engineer officers holding the relative rank of captain, commander, and lieutenant-commander shall take rank in the line of the Navy according to the dates at which they attained such relative rank. Engineer officers graduated from the Naval Academy from eighteen hundred and sixty-eight to eighteen hundred and seventy-six, both years inclusive, shall take rank in the line next after officers in the line who graduated from the Naval Academy in the same year with them: *Provided*, That when the date of a line officer's commission as captain, commander, or lieutenant-commander and the date when the engineer officer attained the same relative rank of captain, commander, or lieutenant-commander are the same, the engineer officer shall take rank after such line officer."

Chief Engineer Kearny was a member of the class graduated from the Naval Academy in 1868, and was, under the provision of section 2, relating to engineer officers, graduated from 1868 to 1876, inclusive, assigned by your Department to a place "in the line next after officers in the line who graduated" in the same year with him, that is to say, among officers holding the rank of lieutenant-commander. From this action he appealed, and your Department, in an indorsement dated March 11, sustained his contention, holding that under the first provision of section 2, prescribing "that engineer officers holding the relative rank of captain, commander, and lieutenant-commander shall take rank in the line of the Navy according to the dates at which they attained such relative rank," he was entitled, having attained the relative rank of commander prior to the passage of the personnel bill, to a rank in the line as commander, according to the date at which he attained that relative rank.

Subsequently, under date of March 17, Lieutenant-Commander Richard Wainwright, United States Navy, asked a review of the matter by your Department in a communication in which he referred to the history of the navy person-

nel bill, and especially to the fact that section 2 was drawn by a board of officers of which he was a member, and that "the intent of section 2 was to provide in the amalgamation that engineer officers graduated from the Naval Academy from 1868 to 1876, both years inclusive," should, as provided in the second sentence of that section, be so transferred to the line as to take rank below line officers "who graduated from the Naval Academy in the same year with them."

It is to be noted that a considerable period elapsed between the date when the measure in question was drafted by the personnel board and the time when it became a law. During this interval the status of certain engineer officers was changed, Chief Engineer Kearny, for example, passing during that time from the relative rank of lieutenant-commander to the relative rank of commander.

In a communication dated March 22, and addressed to Lieutenant-Commander Wainwright, you declined to reverse your decision of March 11, in which you held that engineer officers who, prior to the passage of the personnel bill attained the relative rank of commander, became entitled to that actual rank in the line of the Navy; but, at the same time, "inasmuch as the rights of a considerable number of officers are involved in the question," you stated you would request the advice of the Attorney-General in the matter, and this you have done.

I have given this matter careful consideration, and I can find no grounds sufficient to justify me in overruling the position taken by your Department. The reasons in support of the conclusions you reached are stated with such fullness and clearness in your communication to Lieutenant-Commander Wainwright, that I content myself by quoting your language as an adequate expression of the considerations which should govern in this matter:

"The Department has given careful attention to the considerations urged in your letter of the 17th instant with regard to the positions in the line of the Navy to be assigned to certain engineer officers who graduated from the Naval Academy in the year 1868.

"The questions thus brought up were originally considered in the Department's decision of the 11th instant, in the

case of Chief Engineer Kearny, and in reviewing then the arguments advanced by you, based in some measure upon your acquaintance with the history of the legislation in question and your personal knowledge of the purposes which governed the personnel board in the preparation of the draft of the bill, have received attentive examination; and in this connection your statement that 'the intention of the bill was to place all the engineers that graduated in 1868 after the line officers of the same date,' is noted. The Department entertains no doubt whatever that this was the intention of the personnel board in drafting the clause in question, and such would undoubtedly have been its effect had it been passed at the time it was drawn. What would have been the view of the board had the question been considered after certain of the engineers of the classes 'graduated from the Naval Academy from 1868 to 1876, both years inclusive,' had been, at or before that time, actually advanced to the relative rank of commander, as was the case when the measure became a law, is a very different matter. It may be fair to assume that in such a case some provision would have been made for the different state of facts which would thus have been presented.

"The rule to be followed in such cases is thus laid down in 'Endlich on the Interpretation of Statutes' (sec. 30, p. 41), as follows: 'It is unquestionably a rule that what may be called the parliamentary history of an enactment is "wisely inadmissible" to explain its meaning. * * * The meaning attached to it by its framers * * * can not control the construction of it. In giving construction to a statute we can not be controlled by the views expressed by a few members of the legislature who expressed verbal opinions on its passage. Those opinions may or may not have been entertained by the more than a hundred members who gave no such expression.' And with respect particularly to the proceedings of commissions the following remarks appear in the same volume (sec. 32, p. 42):

"What took place before a committee can not be invoked for putting a construction on a private act. 'Similarly, it has been held in England that no legitimate guide to the construction of a statute can be found in the recommenda-

tions and reports of commissions, which preceded the passage thereof, and upon which it was founded, as the reports and recommendations of the real property commissioners, of the ecclesiastical commissioners, of the common law and chancery commissioners.' And the rule seems to be the same in this country, although perhaps not followed with universal consistency.'

"The statement contained in your letter that 'it would be a manifest absurdity to arbitrarily divide the engineers and place some at the head and some at the foot of the class of 1868,' is also noted. It is observed, however, that the only alternative to such action would be a division of the engineers having the relative rank of commander at the time of the passage of the personnel act by giving some of them, to wit, those who had attained that relative rank at the time the personnel bill was drawn, the actual rank of commander, and denying that privilege to others, and this in the face of the explicit provision of section 2, that engineer officers holding the relative rank of commander shall take rank in the line according to the dates at which they attain such relative rank. It is difficult to say, therefore, which interpretation presents from this point of view alone the least objectionable features. Referring again to the principles governing the interpretation of statutes, it has been said that 'so long as a legislative enactment violates no constitutional provision or principle it must be deemed its own sufficient and conclusive evidence of the justice, propriety, and policy of its passage.' The language of Mr. Justice Story concerning constitutional construction applies almost equally to that of statutes. Arguments drawn from impolicy or inconvenience ought here to be of no weight. The only sound principle is to declare its *lex scripta est*, to follow and to obey; nor, if a principle so just could be overlooked, could there be well found a more unsafe guide or practice than mere policy or convenience." (Endlich, sec. 5, pp. 8-9.)

"It is understood that in the present instance embarrassment has arisen, not because of any want of clearness in the language of the law, but because the facts are not what they were when the measure was under consideration by the per-

sonnel board. A considerable period elapsed between that time and the date on which the measure was enacted into law, and during the interval the status of certain engineer officers was changed. They became vested with the relative rank of commander, and the Department has held that, upon transfer to the line, they were entitled to take rank accordingly. That this result may not have been intended by the personnel board in drafting the bill is a matter to be considered only if it be conceded that the provision of law to be interpreted is so ambiguous that a correct understanding of its meaning can not otherwise be reached. Before the slight assistance which such a circumstance can render is invoked the entire statute in all its parts must be scrutinized. The evils sought to be remedied by the whole measure must be taken into account "so as to get an exact conception of its aim, scope, and object." (Endlich, sec. 27.) Approaching the subject in the light of these general principles, it is noted that the personnel act was broadly beneficial in its aims and purposes so far as the personnel of the Navy is concerned. Its general object was to advance, not to reduce, the rank of the officers affected by its provisions. If, as is contended, an engineer officer who attained the relative rank of commander February 24, 1899, is, under the first sentence of section 2 of the personnel act, entitled to take rank as a commander, and if, at the same time, under the second sentence of that section, being a graduate of the class of 1868, it is provided that he should be assigned to a lower grade than that of commander, which of the two positions should be given him in the administration of a law of the character of the personnel act? Assuredly, under these broad and general considerations, no reason to modify the conclusion heretofore reached upon other grounds is discovered. To give the engineer officer in such a case the higher position is to treat him as other officers of the same relative rank are treated; to assign him to the lower place which he would take if the second sentence of section 2 were invoked, would be to degrade him from the relative rank of commander, to which in fact and in law he had attained prior to March 3, 1899, and this under the provisions of a law bearing a wholly remedial and beneficial complexion, and containing within

itself carefully worded intimations characterizing it as a measure intended to benefit and not to injure officers affected by its provisions. A clause illustrating the latter suggestion is the following, embodied in section 13:

“‘That no provision of this act shall operate to reduce the present pay of any commissioned officer now in the Navy, and in any case in which the pay of such an officer would otherwise be reduced he shall continue to receive pay according to existing law.’

“Certain further considerations not referred to in the case of Chief Engineer Kearny, because it was not there deemed necessary to go so fully into the matter, are the general principle that an officer is not to be deprived of rank which he has actually attained inferentially; that if there are two provisions of law equally clear, one of which confers a lower and the other a higher position upon a beneficiary, he is entitled to claim the benefit of the latter; that no distinction is drawn in the law—and none can be written therein by interpretation—between engineer officers who attained the relative rank of commander before, and those who attained that rank after, the original draft of the personnel act was completed; and further, that from a structural examination of the act it is found that section 1 provides broadly and generally, without details, for the transfer of the engineer officers of the line, and that the first sentence of section 2, logically following, lays down the broad general principle ‘That engineer officers holding the relative rank of captain, commander, and lieutenant-commander’ shall have like absolute rank in the line. The foundations of this part of the measure being thus laid, explicit provisos modifying them might, of course, have been added; but the only explicit proviso found is one which sustains rather than defeats these general clauses, i. e., the proviso in section 2 that when the date of a line officer’s commission as commander and the date when an engineer officer attained that relative rank are the same, the engineer shall take rank after, that is, as the phrase has been repeatedly interpreted, *next after* such line officer.

“Without entering more particularly into a review of the various considerations urged in your letter above men-

tioned, and while appreciating the force of many of them as showing what perhaps ought to have been done, as well as what was doubtless in the contemplation of the personnel board, the Department does not find therein sufficient ground to warrant a reversal of its decision that, under the law as it was in fact enacted, engineer officers who, prior to the passage of the personnel act, attained the relative rank of commander, became entitled to that actual rank in the line of the Navy."

I am of the opinion, therefore, that engineer officers who, prior to the passage of the personnel bill, attained the relative rank of commander became entitled, under the first sentence of section 2, to take that actual rank in the line of the Navy.

Respectfully,

JOHN K. RICHARDS,
Acting Attorney-General.

THE SECRETARY OF THE NAVY.

REAPPRAISEMENT—EXAMINATION.

The Board of General Appraisers were warranted in refusing to hear and pass upon a question whether an importer was justified in refusing to answer interrogatories under sections 16 and 17 of the act of June 10, 1890, submitted to them in a reappraisal proceeding under section 13.

An importer refusing to answer a proper question respecting imported merchandise has not complied with the requirements of law, and is not entitled to a reappraisal, but the original appraisal becomes final and conclusive under section 17 of this law.

The collector is the authority to determine whether an interrogatory is proper and the refusal to answer is justified.

The action of the collector in denying a reappraisal because the importer refused to answer proper interrogatories propounded to him may be reviewed, first, by the Board of General Appraisers on a protest under section 14, and next by the circuit court on an application for review under section 15.

DEPARTMENT OF JUSTICE,
May 6, 1899.

SIR: Sections 16 and 17 of the customs administrative act of June 10, 1890, read as follows:

"SEC. 16. That the general appraisers, or any of them,

are hereby authorized to administer oaths, and said general appraisers, the Boards of General Appraisers, the local appraisers, or the collectors, as the case may be, may cite to appear before them, and examine upon oath, any owner, importer, agent, consignee, or other person touching any matter or thing which they, or either of them, may deem material respecting any imported merchandise, in ascertaining the dutiable value or classification thereof; and they, or either of them, may require the production of any letters, accounts, or invoices relating to said merchandise, and may require such testimony to be reduced to writing, and when so taken it shall be filed in the office of the collector, and preserved for use or reference until the final decision of the collector or said board of appraisers shall be made respecting the valuation or classification of said merchandise, as the case may be.

"SEC. 17. That if any person cited to appear shall neglect or refuse to attend, or shall decline to answer, or shall refuse to answer in writing any interrogatories, and subscribe his name to his deposition, or to produce such papers, when so required by a general appraiser, or a Board of General Appraisers, or a local appraiser or a collector, he shall be liable to a penalty of one hundred dollars; and if such person be the owner, importer, or consignee, the appraisement which the general appraiser, or Board of General appraisers, or local appraiser, or collector, where there is no appraiser, may make of the merchandise, shall be final and conclusive; and any person who shall willfully and corruptly swear falsely on an examination before any general appraiser, or Board of General Appraisers, or local appraiser, or collector, shall be deemed guilty of perjury; and if he is the owner, importer, or consignee, the merchandise shall be forfeited."

In your communication of December 14, 1898, you state that, in the exercise of the authority conferred by these sections, the appraiser at New York propounded certain interrogatories to an importer, which the latter refused to answer, insisting they were inquisitorial and impertinent. A question then arose as to the course to be pursued under

the customs administrative act in determining whether the interrogatories were proper or not. Acting under the advice of the Solicitor of the Treasury, your Department promulgated a ruling to the effect that the Board of General Appraisers, in a reappraisal proceeding under section 13, may determine whether the importer was justified in refusing to answer the interrogatories. You state, however, that the Board of General Appraisers at New York have declined to act in accordance with this ruling, holding that in a reappraisal proceeding under section 13, they have no authority to pass upon a question of law relating to the propriety of an interrogatory propounded by the appraiser.

In view of the foregoing, you request an expression of my opinion as to the course to be followed when an importer refuses to answer an interrogatory propounded by an appraiser under sections 16 and 17.

Assuming that a case has thus arisen in the administration of your Department which warrants me in giving you advice in the premises, I am clear in the opinion that the Board of General Appraisers were right in refusing to hear and pass upon a question of law thus attempted to be submitted to them in a reappraisal proceeding under section 13. Section 17 provides that if the importer refuses to answer any interrogatory propounded under section 16, "the appraisal which the general appraiser, or Board of General Appraisers, or local appraiser, or collector, when there is no appraiser, may make of the merchandise shall be final and conclusive."

The refusal to answer which makes an appraisal final and conclusive under section 17 is an unlawful refusal. The interrogatory which must be answered under the penalty of a conclusive appraisal is a proper and lawful interrogatory. Some authority must determine primarily the question as to whether the interrogatory is proper, and the refusal unlawful and the appraisal conclusive. I take it that the collector is the officer to determine this question. Under section 13 the appraiser must report to the collector his decision as to the value of the merchandise appraised.

If the collector deems the appraisement too low he may order a reappraisement. And if the importer is dissatisfied with the appraisement "and shall have complied with the requirements of law with respect to the entry and appraisement of his merchandise," he may give notice to the collector in writing and the collector shall at once direct a reappraisement.

It is to be observed that it is only when the importer "shall have complied with the requirements of law with respect to the entry and appraisement of his merchandise" that he is entitled to a reappraisement. The collector must determine primarily whether the importer has or has not complied with the requirements of law. If the importer has refused to answer a proper question put to him respecting the imported merchandise, he has not complied with the requirements of law, for the law requires him to answer such an interrogatory. Not having so complied, he is not entitled to a reappraisement, and under section 17 the appraisement made becomes "final and conclusive."

If the collector decides that the importer was right in refusing to answer, the importer secures the benefit of a reappraisement under section 13. On the other hand, if the collector decides that the importer was wrong in refusing to answer, the importer loses the right to a reappraisement, the appraisement becomes conclusive, and the collector proceeds to ascertain the rate and amount of duties to be paid on the merchandise. The action of the collector in denying the importer a reappraisement because of his refusal to answer proper interrogatories propounded to him by the appraiser, may be reviewed, first, by the Board of General Appraisers on a protest, under section 14, and next by the circuit court, on an application for review under section 15. An excessive valuation, resulting from an error of judgment, may be revised by a reappraisement under section 13, but an illegal assessment, based upon an erroneous view of the law, must be corrected by proceedings under sections 14 and 15.

"While the general rule is that the valuation is conclusive upon all parties, nevertheless the appraisement is subject to be impeached where the appraiser or collector

has proceeded on a wrong principle contrary to law, or has transcended the powers conferred by the statute." (*United States v. Passavant*, 169 U. S., 16, 21.)

Respectfully,

JOHN K. RICHARDS,
Acting Attorney-General.

The SECRETARY OF THE TREASURY.

IMMIGRANTS.

An act of Congress should receive a reasonable construction and be so enforced as to produce as little injury and inconvenience as may be consistent with its terms and object.

The list of immigrants required by section 1 of the act of March 3, 1893, should be made before departure from a foreign country.

Under this act the immigrants can not be divided according to the parts of the vessel they occupy, as the word "immigrant" undoubtedly embraces persons who may be, and sometimes are, in the cabins.

The Secretary of the Treasury is vested with power to make and apply such rules relative to the question of immigration as may be shown from time to time to be necessary and convenient.

The separation of those who should and who should not be subjected to the examination and listing is a matter of practical administration intended to be regulated by the Secretary of the Treasury.

DEPARTMENT OF JUSTICE,
May 8, 1899.

SIR: I have your letter of the 27th ultimo asking in effect whether lists of immigrants should, under section 1 of the act of March 3, 1893, be made before departure from a foreign country or in accordance with the following order of November 14, 1898, now revoked:

"To commissioners of immigration, collectors of customs, and all other officers having authority to enforce United States immigration laws:

"It having been found that a literal compliance with the provisions of section 1 of the act of March 3, 1893, would seriously and unnecessarily inconvenience immigrants coming to this country as cabin passengers, you are hereby informed that if the manifests required by Department circular No. 180, of October 8, 1898, are made out prior to the arrival of the steamship at your port and sworn to before a United States immigrant inspector or customs officer act-

ing in that capacity upon arrival, such manifests will be accepted as a sufficient compliance with the requirements of the law.

"Respectfully yours,

"T. V. POWDERLY,

" *Commissioner-General.*

"Approved:

"O. L. SPAULDING,

" *Acting Secretary.*"

In my opinion, as the statute is explicit to the effect that the lists shall be "made at the time and place of embarkation of such alien immigrants on board," and as such provision can not be said to be one which Congress may not be supposed to have regarded as of utility, it will not do to give much weight to considerations of inutility or inconvenience.

But while there seems to be no doubt that the lists of immigrants should be made out before departure, and therefore the order of November 14, 1898, which, by reference to circular No. 180 embraces lists of "all such alien immigrants, whether traveling first or second class or in the steerage," is erroneous, yet there remains a question.

An act of Congress should receive a reasonable construction, and one like this be so enforced as to produce as little injury and inconvenience to the traveling public and commerce as may be, consistently with its terms and object.

If, as I understand from your letter and its inclosures, it is both *useless* and inconvenient to put cabin passengers, before sailing, through the processes mentioned in sections 1 and 2 of the act of 1893, it might well be argued that we are not giving a reasonable construction to that law and properly applying it, when this is held to be within its meaning.

Congress itself has made a distinction (act of August 2, 1882) between "emigrant passengers or passengers other than cabin passengers" and such cabin passengers. The act of 1882 "to regulate the carriage of passengers by sea" contains elaborate provisions to secure the proper treatment and accommodation of "emigrant passengers" and passengers commonly known as steerage passengers, in distinction from cabin passengers.

Within the meaning of statutes, therefore, not foreign to the subject of immigration, Congress has treated immigrants as persons different from cabin passengers, recognizing in that the notorious fact that immigrants are usually not cabin passengers.

But, as a matter of law, it must be said that immigrants under the act of 1893 can not be divided according to the parts of the vessel they occupy. The word immigrant undoubtedly embraces persons who may be and sometimes are in the cabins, and, while but few are there, a ruling to the effect that no cabin passengers are immigrants would probably increase the number. Neither do I feel assured that all owners of vessels would fail to alter their present charges and arrangements with a view to carrying in the cabins persons who do not now go into them.

The subject was one of difficulty for Congress, as it is in practice; and it is natural to suppose that, had the division of immigrants from others by the simple separation into cabin and not cabin passengers been a safe and a practical one, Congress would have expressly adopted it in framing the act of 1893.

Not satisfied with inspections and other checks already provided for by law, Congress deemed it necessary to require those specified in that act, knowing, of course, that additional trouble would thereby be caused. We can not nullify that law, nor have we any right to attempt it.

But section 3 of the general immigration law of 1882 provides:

"SEC. 3. That the Secretary of the Treasury shall establish such regulations and rules, and issue from time to time such instructions not inconsistent with law as he shall deem best calculated to protect the United States and immigrants into the United States from fraud and loss, and for carrying out the provisions of this act and the immigration laws of the United States; and he shall prescribe all forms of bonds, entries, and other papers to be used under and in the enforcement of the various provisions of this act."

And section 2 says:

"That the Secretary of the Treasury is hereby charged with the duty of executing the provisions of this act and

with supervision over the business of immigration to the United States," &c.

And by these and other provisions of law it is made clear that Congress, aware of the practical impossibility of establishing in advance by inflexible orders of its own all the rules and methods that so indefinite and complex a business, entangled as it was with that of carrying passengers, would demand, intended to vest in the Secretary power to make and apply such as would, from time to time, be shown by experience to be necessary and convenient.

It is from this authority of the Secretary that it seems not altogether impossible to obtain the desired relief, in part, if not wholly.

As I understand, the masters of vessels, as the only safe way of proceeding on their part, practically examine all the passengers. The act requires only the examination and listing of alien immigrants. In the absence of any certain and obvious means of knowing whether a person is or is not an alien immigrant, the phrase itself being to them of vague meaning, and having the responsibility of deciding placed upon them by law, the masters naturally take that course, and thereby "delay, impede, or annoy passengers in ordinary travel." (Sec. 8, act of March 3, 1891.)

They proceed on the assumption that everyone is an alien immigrant. But there is nothing in the act of Congress to indicate that everyone is intended to be regarded as *prima facie* an alien immigrant and subject to examination.

Congress requires a list of all "alien immigrants," and prescribes a penalty if one of them is omitted from the list; and while I am aware that from the prior legislation referred to there may be reasons gathered for giving a very broad meaning to the word "immigrants," and for holding that the master must, at his peril, examine every alien on board and perhaps Americans, also, to prevent the omission of any alien immigrants from the list, yet I can not regard it as consistent with the wisdom of Congress that a thing so unreasonable, so obstructive of passenger travel, so harassing to vessels whose passengers come aboard shortly before the hour for departure, so annoying and distressing to per-

sons traveling for pleasure, should be required under a penalty.

The nature of the examination, the listing in groups of thirty, the tickets for identification, the surgeon's examination, requiring, I presume, the removal of the clothes,—all these things would seem to amount almost to a prohibition of ordinary traveling by foreigners in this country, if every alien passenger must be subjected to them.

Such a prohibition was surely not intended. But, in my judgment, the separation of those who should and those who should not be subjected to the examination and listing, is a matter of *practical administration* intended to be regulated by you, Congress not desiring, on the one hand, that the entry of undesirable persons should thereby be given free scope, or, on the other, that ordinary passengers should be uselessly annoyed, and vessels—often carrying mail—unreasonably delayed, in an effort to prevent the incoming of such persons.

This seems to be a region in which the wisdom of your Department can properly be used to devise a system of instructions to inspectors and other officers and corresponding circulars to masters which will assure the latter that certain reasonable evidence or a reasonable ground of presumption that a person is not one required to be examined and listed will be regarded by such officers and the Department as sufficient reason for not proceeding to enforce the penalty against such masters.

Such a system would not be at variance with the intent of Congress but in furtherance of it. And it would be no objection to such a system that it was based on a presumption, supported by the oath of the master upon his best knowledge and belief or other evidence, that the cabin passengers were not aliens immigrating—that is, aliens, not already domiciled in this country, coming to make it their home—and were not excluded persons, if and so long as it might be found by experience and inspection that they were, in fact, in substantially all cases, not such persons.

Respectfully,

JOHN W. GRIGGS.

The SECRETARY OF THE TREASURY.

CONTRACTS—FINAL PAYMENTS—ORDNANCE.

Pursuant to the act of June 6, 1896, the Secretary of War entered into a contract for the construction of a certain type of gun, for which 85 per cent of the sum appropriated was to be paid as the work progressed, and the remainder upon its completion and test. The gun was completed and successfully stood the regular proof test, but upon recommendation of the Board of Ordnance, it was subjected to the ordnance test of being fired 300 times, and, as a result, on the fifteenth round the gun was destroyed. *Held*, that the contractor was entitled to the final payment, as neither the statute nor the contract made it necessary that the gun should be capable of any particular performance, nor that it should successfully withstand any test of strength; so therefore, the payment was not dependent upon any such performance or test.

DEPARTMENT OF JUSTICE,

May 9, 1899.

SIR: I have the honor to acknowledge the receipt of your note of April 11, 1899, with accompanying documents, requesting my opinion whether R. J. Gatling is entitled to the final payment of 15 per cent claimed to be due him under his contract with the Secretary of War for the construction of the 8-inch caliber high-power steel gun mentioned in the act of Congress referred to.

The case appears to be this:

A portion of the act of June 6, 1896 (29 Stat., 256), provides as follows (p. 261).

“To enable the Board of Ordnance and Fortifications to procure and test one eight-inch caliber high-power gun, cast in one piece, on the plan of R. J. Gatling; and the Secretary of War is hereby authorized and directed to contract with said Gatling for said gun, without advertisement, which gun shall be constructed according to the plans and specifications prepared by said Gatling, and under his supervision, and be subjected to the same test now applied to the built-up gun of the same caliber; and the sum of forty thousand dollars is hereby appropriated to pay for said gun, of which sum eighty-five per centum shall be paid in partial payments as the work progresses, in accordance with the contract to be entered into between the Secretary of War and the said Gatling, and the remainder upon the completion and test of said gun: *Provided*, That, before said contract shall be

entered into, the plans and specifications of said gun shall be deposited with the Secretary of War, which plans and specifications may be modified, in the discretion of said Gatling, from time to time as the work progresses: *And provided further*, That the said gun shall conform in general form and dimensions to modern ordnance, and shall not therefore differ materially in form and dimensions from service guns, in order that it may admit of being placed on a service carriage, and in a service emplacement on fortification."

Under the authority of this statute the Secretary of War, on August 7, 1896, made with said Gatling the contract contemplated by this act, under which Gatling built the gun, as provided in said act and contract, and 85 per centum of the sum thus appropriated was paid to him as the work progressed and as provided in the contract.

After its completion the gun was subjected to the regular proof test applied to high-power guns of that caliber—firing five rounds—which test it stood successfully; but, upon recommendation of the board, it was subjected to the ordnance test of being fired 300 times with full service charges of powder, and on the fifteenth round of this test the gun was destroyed, as a result of the firing.

Whether Dr. Gatling is entitled to the remaining 15 per centum of the sum appropriated depends upon what is the proper construction of the act referred to and of the contract thereunder. And the principal question in this respect is whether the act of Congress required a gun which should successfully stand the test provided, or, on the other hand, merely required that a gun of a certain kind should be built according to the plans and specifications of Dr. Gatling, by him, and under his supervision. In other words, does the statute or the contract make payment conditional upon the gun's successfully enduring the prescribed test?

The question is not difficult of solution. In the first place, neither the statute nor the contract requires that the gun shall be capable of any particular performance, nor that it shall successfully withstand any test or strain, nor is payment made to depend upon any such performance or test, or upon anything whatever, except the making the gun of the

kind described and according to the plans and specifications stated, and that it be thus built in a proper and workmanlike manner and of good and suitable materials. This is of itself sufficient. But the very fact that Congress prescribes the kind of gun it wishes built—a gun cast in one piece—and directs that it shall be built according to certain plans and specifications, entirely precludes the idea, unless otherwise expressed, that the contractor who is to build the gun warrants anything as to its performance. Nor is this at all affected by the fact that the kind of gun and the plans and specifications are all the suggestion of the contractor. Dr. Gatling appears to have thought he could make a serviceable gun upon his plan, which would be much cheaper than those already in use, and Congress was so far of his opinion as to be willing to pay for the experiment, and although the whole—the kind of gun and the plans and specifications upon which it was to be built—were the suggestions of Gatling, yet they were none the less chosen and prescribed by Congress and dictated by it for the making of the gun than if they had originated with that body; and, thus directing what should be done, Congress assumed all risks as to the result.

From what appears in the case, also from general knowledge accessible to all, this kind of gun was a novelty, a new departure in ordnance, an experiment, which, if successful, would materially lessen to the Government the cost of heavy ordnance. As appears, it did not have the confidence of the ordnance officers of the Government. Of course, no one could tell beforehand what its performance would be, and to wait until someone would undertake its construction with a guaranty of performance would be to abandon it altogether.

Under these circumstances the portion quoted was inserted in the fortification act of June 6, 1896, which itself tells the same story of an experiment by the Government in gun making, "*To enable the Board of Ordnance and Fortification to procure and test one eight-inch caliber high-power gun, cast in one piece, on the plan of R. J. Gatling.*"

That is, to enable *this Board of Ordnance* to procure and test a gun of this kind for the satisfaction and benefit of the Government, the Secretary of War is authorized to contract with Dr. Gatling to build it. And the only stipulations the

Government makes are that the gun shall be of this general kind and be built according to certain plans and specifications, and with certain requirements as to form and dimensions. It is impossible to see anything here more than a promise to build for the Government a gun of a kind chosen by itself, upon plans and specifications of its own dictation, and without reference as to what its performance may prove to be.

And, to still further show this, and that payment did not depend at all upon the success of the experiment, or that the gun should survive the prescribed test, 85 per centum of the whole sum is to be paid as the work progresses, and with no provision for its return in case of failure, and the remaining 15 per centum is absolutely promised "upon the completion and test of said gun." And nowhere in the act or in the contract is there any intimation that the gun shall be capable of any performance, or be of any service, or shall withstand any test, nor that payment is to depend upon any of these considerations. All this is quite consistent with the idea that the Government is trying an experiment at its own risk and quite inconsistent with the claim that Dr. Gatling is doing so.

The only use for the test provided to which the gun was subjected, and which it successfully endured, had relation to whether the gun was completed according to the contract; that is, to show whether any defects, if there were any, were due to noncompliance with the contract, and to determine, by actual firing, whether the gun was finished complete in all its parts and details, and not at all to make its performance the condition of payment. The other, the crucial or endurance test, to see just how much strain such a gun could stand, and which might well be purposely continued to the bursting point, the Government would make at its leisure and convenience.

And this is just what was done. The Ordnance Board applied the regular proof test of firing 5 rounds, and then, because the gun was of a new type and of unknown capabilities, the board recommended that the endurance test of firing 300 rounds with full service charges of powder be applied, fourteen rounds of which the gun withstood, but burst at the

fifteenth. But this test was for the information of the Government, and was not a precedent condition of payment. And the fact that payment is promised absolutely "upon the completion and test of said gun," and not upon or in case of its endurance of the test, is entirely conclusive of the whole matter. The language is plain and there is nothing to construe. Had it been intended that payment was to depend upon the result of the test, here was the place for its expression, both in the statute and in the contract, and when we find that 85 per centum of the whole \$40,000 was to be unconditionally paid as the work progressed, and the remainder, alike unconditionally, "upon the completion and test of said gun," we know with substantial certainty that this was purposely so done, and that the failure to make payment dependent upon success was not by mistake, even if that would have made any difference.

But even if, upon any possible construction of the statute and contract, this payment were dependent upon the result of the test prescribed, the same conclusion would seem to be the correct one. That test, by the terms of both statute and contract, is to be "the same test *now* applied to the built-up gun of the same caliber." Dr. Gatling claims, and from the papers in the case and inquiry at the Ordnance Bureau it would seem that he is right, that in 1896, when this act was passed and this contract made, this endurance test of firing 300 rounds, with full service charges of powder, was not generally applied to built-up guns of that caliber. If this be so, the test which burst his gun was one not provided for in the contract, and was one the failure to withstand which had no effect upon the obligation to make payment.

But, while I am of opinion that upon this ground also the claimant is entitled to the 15 per centum retained, I prefer to rest the case upon the other ground, which involves no question of fact liable to dispute. And as there appears to be no question that the gun was of the general kind required and built as and upon the plans and specifications prescribed in the statute and contract, and with no cause of complaint or objection except that the gun was not serviceable and could not endure the applied test, there remains but the legal

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question, before discussed somewhat, whether these latter facts constitute a sufficient reason for nonpayment. And I am clearly of opinion that they do not.

I have, therefore, to advise you that upon the facts stated the claimant, Dr. Gatling, is entitled to be paid the remainder of 15 per centum of the appropriation made for the construction of this gun.

Respectfully,

JOHN W. GRIGGS.

The SECRETARY OF WAR.

APPROPRIATIONS—AGRICULTURAL COLLEGES—EXPERIMENT STATIONS.

The respective appropriations for agricultural experiment stations, and for agricultural colleges and schools, being separate and distinct, no portion of the appropriation for the former can be applied to the payment of salaries of professors or teachers in the latter.

DEPARTMENT OF JUSTICE,

May 10, 1899.

SIR: I have the honor to acknowledge the receipt of your note of April 27, 1899, requesting my opinion as to the validity of a certain ruling of your Department as to the application of any portion of the appropriation for agricultural experiment stations, to the payment of salaries of professors or teachers in the agricultural colleges and schools established under the act of July 2, 1862.

The ruling is, in effect, that no portion of the funds appropriated by the act of March 2, 1887, for experiment stations, can be applied in payment of salaries of professors or teachers or other persons engaged in instruction in the agricultural colleges or schools contemplated by the act of July 2, 1862, nor to the payment of any other expenses connected with the work of instruction in such colleges or schools.

While the agricultural experiment stations established by the act of March 2, 1887, are departments of and under the direction of the agricultural colleges provided for in the act of July 2, 1862, yet they are separate and distinct, not only as to the time of their origin, but also as to their objects

and methods and their means of support and maintenance, the latter being established and provided for by the act of July 2, 1862, as educational institutions for the dissemination of knowledge already acquired, and originally under said act receiving their support and having their expenses paid from the proceeds of public lands granted by Congress to the States and Territories, respectively, for that purpose. The former are established and provided for by the act of March 2, 1887, and later acts, and for the purpose of acquiring, by experiment and practice, scientific knowledge of agricultural and cognate subjects, and are supported and their expenses paid by direct annual appropriations of money by Congress for that purpose.

From these considerations alone it would be fairly obvious that the fund thus set apart for the support and maintenance of either of these institutions can not be used for the support, maintenance, or expenses of the other.

In addition to this, the act of August 30, 1890, provided a further annual money appropriation "for the more complete endowment and maintenance of colleges for the benefit of agriculture and the mechanic arts now established or which may be hereafter established in accordance with the act of Congress approved July second, eighteen hundred and sixty-two, * * * to be applied only to instruction in agriculture, the mechanic arts, the English language, and the various branches of mathematical, physical, natural, and economic science, with special reference to their applications in the industries of life and to the facilities for such instruction."

While this appropriation, with the proceeds of land grants before mentioned, is exclusively for the support and maintenance of the agricultural colleges and schools established under the act of July 2, 1862, provision for the support of the agricultural experiment stations, established later, is made by section 4 of the act of March 2, 1887, which, with reference to these experimental stations, provides:

"That, for the purpose of paying the necessary expenses of conducting investigations and experiments, and printing and publishing the results, hereinbefore prescribed, the

sum of seven thousand dollars per annum is hereby appropriated to each State and Territory."

It will be seen that these respective appropriations for agricultural colleges and schools and for the experiment stations are separate and distinct, and that each is intended exclusively for, and to be applied alone to the expenses of the institution for which it is made.

It follows, therefore, that your ruling, referred to, is a correct interpretation of the law, and I so advise you.

Respectfully,

JOHN W. GRIGGS.

The SECRETARY OF AGRICULTURE.

PER DIEM EMPLOYEES—NAVY-YARD.

On April 6, 1899, the Washington Navy-Yard being closed at noon, pursuant to an Executive order, in connection with the ceremonies attending the interment of the bodies of soldiers and sailors whose lives were lost in the war with Spain, the per diem employees of the yard should receive compensation for the entire day.

DEPARTMENT OF JUSTICE,

May 10, 1899.

SIR: I have the honor to acknowledge receipt of yours of May 6, in which you ask my opinion as to whether, under the law, certain per diem employees of the United States in the navy-yard at Washington, D. C., are entitled to be paid for the half day afternoon of April 6, 1899.

The facts disclosed in your communication are that the day in question was that on which the bodies of soldiers and sailors who lost their lives in the war with Spain were being interred at Arlington. The President, on the 3d of April, 1899, in connection with the ceremonies attending these interments, issued an Executive order in which, among other things, he directed "that at twelve o'clock noon of said day all of the departments of the Government at Washington shall be closed," and on the 5th day of April the President directed his secretary to inform the Secretary of the Navy that the employees of the Washington Navy-Yard should be considered as coming within the scope of the Executive order of the 3d.

In obedience to the Executive order, and the direction thereafter given, the Washington Navy-Yard was closed at noon on the said 6th day of April, 1899, and work therein was discontinued for the day.

The suggestion is made that the per diem employees of the navy-yard on that day are not entitled to wages for the entire day, but are restricted to compensation for the time they were actually engaged in doing work. The law cited in support of this position is section 1545 of the Revised Statutes, which reads as follows:

"SEC. 1545. Salaries shall not be paid to any employes in any of the navy-yards, except those who are designated in the estimates. All other persons shall receive a per diem compensation for the time during which they may be actually employed."

The latter clause of the act is that relied upon, it being contended that after the closing of the work at noon the persons who were serving for a per diem were not actually employed by the Government.

I do not agree to this proposition.

The President of the United States by his Executive order directed that the work in the navy-yard for the day in question should close at 12 o'clock noon. These employees did not cease work on their own motion, nor were they discharged from the Government service for the remaining part of the day. They had severally begun a day's work under a contract with the Government, and had continued to work until the authorities of the United States closed the navy-yard, shut up its workshops, and arbitrarily required them to stop. Under these circumstances the employees were not in the position they would have occupied had they taken a holiday or been absent voluntarily. They were still actually in the employment of the Government, though instead of laboring in the navy-yard they were engaged, by the direction of the President, in doing honor to the heroes who gave their lives for the country in a foreign war. It is true that the statute of the United States provides that eight hours shall constitute a day's work for all laborers, workmen, and mechanics who may be employed by or on behalf of the Government of the United States, but I do not know

any rule of law which exempts the Government from the same obligation to its employees as that which rests upon a private individual. The employees of the Government in this instance were severally under a contract to do a day's work; they were at the place designated by the Government for the performance of the service required and had been engaged in doing work until noon of the day; they were there ready, willing, and able fully to comply with their part of the contract, when an order from the chief Executive of the nation directs that the place in which the work is going on shall be closed and work therein stopped for the day. It would be most unreasonable to say that these employees could have gone elsewhere and obtained employment for the remainder of the day after the closing of the Government workshop. Under such circumstances not only the law but every principle of justice and fair dealing would entitle these employees to a full per diem. It would be rather a severe commentary upon the patriotism of the nation if, when the President of the United States directs by his Executive order that tributes of honor be paid to the memories of the noble men who lost their lives in their country's service, the expense of such tributes should fall upon the mechanics and laborers in the Government service. It seems to me that it would be a harsh rule to require any employees of the Government to be deprived of their wages during the temporary suspension of actual work in the departments in obedience to an Executive order of the President issued under the circumstances of the order in this case.

Accompanying your letter is an opinion of the Judge-Advocate-General of the Navy, citing the following precedents for allowing the employees at the Washington Navy-Yard full pay when the navy-yard has been closed by Executive order:

August 8, 1885, on the occasion of the funeral of General Grant, entire day.

September 12, 1887, date of unveiling of Garfield statue, one-half day.

August 11, 1888, upon the occasion of the funeral of General Sheridan, entire day.

December 17, 1891, date of the funeral of Admiral Porter, one-half day.

September 20, 1892, twenty-sixth National Encampment of the Grand Army of the Republic, entire day.

October 21, 1892, that day being a general holiday, entire day.

December 31, 1898, the occasion of the funeral of Senator Justin S. Morrill, one-half day.

It is my opinion, therefore, that the per diem employees at the Washington Navy-Yard on the 6th day of April, 1899, should be allowed and paid for the day and that their compensation should not be diminished for the part of the day in which the navy-yard was closed under the Executive order of the President. I am confirmed in this opinion by the custom indicated by the foregoing precedents which seems to have been established in regard to this matter.

Very respectfully,

JAS. E. BOYD,
Assistant Attorney-General.

Approved.

JOHN W. GRIGGS.

The SECRETARY OF THE NAVY.

STATE BANKS—NATIONAL BANKS.

The use by State banks of the word "international" as a portion of their name or title is not in violation of section 5243, Revised Statutes.

A penal statute is to be construed strictly and its provisions can not be extended by construction, implication, or otherwise, beyond the plain meaning of its language.

DEPARTMENT OF JUSTICE,
May 11, 1899.

SIR: I have the honor to acknowledge the receipt of your note of May 9, 1899, with its inclosures, asking my opinion whether the First International Bank of Hannibal, Mo., and other State banks using the word "international" as a part of their name or title violate in doing so the provision of Revised Statutes, section 5243.

The substance of that section is the prohibition to all banks not organized and doing business under the laws of the United States and to all persons and corporations doing

the business of bankers, brokers, or savings institutions not authorized by Congress to do so to use the word "national" as a portion of their name or title, and subjecting each violator of its provisions to a penalty of \$50 for each day of such violation.

The section is a penal statute, and in derogation of the otherwise common right of individuals, corporations, and associations, and by settled rules of construction, must be construed strictly, and its provisions can not be extended by construction, implication, or otherwise beyond the plain meaning of its language.

The word "international" is just as much a separate and distinct word in our language as is the word "national," and the two words, instead of being synonymous or of similar meaning, have entirely different meanings, and neither can be correctly used to express the idea conveyed by the other, nor is either so used in the ordinary use of our language.

Under a statute not penal in its nature it might be proper to inquire, in view of the obvious purpose of this section, whether the word "international" is either in sound or construction so similar to the word "national" as to be fairly calculated to deceive or to lead to the belief that the bank using it as part of its name was a national bank. Even in such case it would seem difficult to arrive at that conclusion. Such a question would be addressed to the average intelligence of mankind and not to a mere thoughtless observer or hearer of the word. And it is not believed that this average intelligence, with that ordinary thought and care which is expected of everyone, would be led to believe that a bank a portion of whose name was the word "international" was therefore a national bank.

But, however this may be, no such considerations are pertinent under such a statute as this.

It will be also observed that Congress contents itself with the prohibition of the single word "national" and does not prohibit the use of any similar word, or word of similar sound or meaning, or of any other word calculated or intended to lead to the impression or belief that the bank using it is a national bank. The whole matter is one for

Congress alone, which might, if it had seen proper, have made its prohibition so broad as to include the word here under discussion; but as it has forbidden only the use of a single word, we are not permitted to extend its provisions by construction, to other words, although they might, perhaps, have been properly embraced in the prohibition.

The same obstructions are alike applicable to the use of the word "first," "citizens," or other word preceding the word "international" as a portion of the name or title of the bank. It quite suffices, as in the case of the other word, that its use is not forbidden, and under such a statute we can not forbid it by construction.

I have, therefore, to advise you that the use by State banks of the word "international," as a portion of their name or title, is not in violation of section 5243, Revised Statutes.

I return herewith the inclosures transmitted with your note.

Respectfully,

JOHN W. GRIGGS.

The SECRETARY OF THE TREASURY.

RECIPROCAL COMMERCIAL ARRANGEMENTS—FRANCE.

Neither the argols of Tunisian or Algerian origin imported from Marseilles are entitled, as products of France, to the benefit of the reciprocal commercial arrangement negotiated between France and the United States under section 3 of the tariff law of 1897.

In this case it is proper to gather the various circumstances from the papers presented and to waive the customary rule of the Department requiring a definite statement of the facts upon which an opinion is requested, in view of the governmental transactions involved, there being no disputed facts.

DEPARTMENT OF JUSTICE,

May 12, 1899.

SIR: I have the honor to acknowledge the receipt of your communication of May 3, with which you transmit a copy of the proclamation of the reciprocal commercial arrangement with France, negotiated under section 3 of the tariff act of 1897, and certain other documents bearing on the question presented, thereupon asking me whether certain argols produced in Tunis and Algeria and imported on April

11 from Marseilles are entitled to the benefits of said commercial arrangement as products of France.

In view of the governmental transactions involved, and as there appear to be no disputed facts, it will be proper to gather the various circumstances from the papers presented and to waive the customary rule of this Department requiring a definite statement by you of the facts upon which the question is submitted. (21 Opin., 36, 201, 506.)

Section 3 of the act of 1897, among other things, authorized the President, for the purpose of equalizing the trade of the United States with foreign countries and their colonies, to negotiate reciprocal commercial agreements upon equivalent concessions with the governments of countries producing and exporting to the United States certain named products and articles, including argols or crude tartar, and to suspend the ordinary duties upon such importations, which then became subject to reduced duties. Accordingly, on May 28, 1898, a reciprocal arrangement was concluded by the United States and France, by which it was agreed that "the following articles of commerce, the product of the soil or industry of France, shall be admitted into the United States at rates of duty not exceeding the following, to wit: On argols, or crude tartar, or wine lees, crude, five per centum ad valorem;" * * * and the proclamation aforesaid, dated May 30, 1898, declared that the collection of the duties theretofore imposed upon said articles, "the products of France," should be suspended and the substituted duties be imposed.

It is to be observed that section 3 of the tariff act of 1897 appears to contemplate such agreements with the government of a country or of a colony or with the government of a country on behalf of a colony thereof, and that the agreement with France expressly refers to products of France only, and not of its colonies or dependencies.

Since the memorandum submitted by the French embassy states that "Tunis is under the protectorate of France only," I find no difficulty in reaching the conclusion that the importations in question from Tunis are not entitled to the benefits of the commercial arrangement with France. In the case of Algeria, however, the memorandum states that

ever since the conquest of 1830 that country has been part and parcel of France, is governed, politically, exactly like France, being divided into three "departments" like those of France, and has therefore been called a "prolongation of France."

Without undertaking to decide the exact relation of Algeria to France, whether that of colony, possession, territory, or dependency, it is, I think, evident when we turn to French customs provisions that Algeria may not properly be called an integral part of France, constituting merely an outlying group of departments thereof; nor may its products be regarded as products of France within the meaning and intention of section 3 of the act of 1897 and the convention and proclamation thereon founded. The French tariff in Schedule E (Bulletin International des Douanes, No. 22, 1896-97, France, 2d ed., p. 106) provides for duties on both colonial and foreign products from "French colonies and possessions," and, as to products of foreign origin imported from Algérie, levies different rates of duties based *inter alia* upon naturalization duties paid in Algeria as "specified in the tariff of the mother country;" and then provides for duties upon such products "imported from other French colonies or possessions." The "Régime applicable to importations from Algeria into France" (id., p. 109) speaks of "importation into the colony." So the separate tariff for Algeria (Bulletin International des Douanes, No. 88, 1895-96, Algeria, 2d ed.) shows in terms that the relation between France and Algeria, so far at least as respects tariff provisions, is that of mother country and colony. Therefore, however the question might be determined in its political aspect, this tariff separation shows that by the French law itself products of Algeria are by no means regarded as products of France.

I am consequently of the opinion that neither the argols of Tunisian origin nor those of Algerian origin are entitled as products of France to the benefits of the commercial arrangement in question.

I return herewith the inclosures of your letter.

Very respectfully,

JOHN W. GRIGGS.

The SECRETARY OF THE TREASURY.

CHIEF RECORD AND PENSION DIVISION.

The effect of the act of March 2, 1899, is to change the rank and pay of the Chief of the Record and Pension Division of the War Department, and not to create a new office.

Upon the approval of the act the chief of such division became entitled to the increased rank and pay without the necessity of a nomination by the President and confirmation by the Senate.

This act did not affect the office as a separate and distinct official position, but it remained the same as when established, to be filled in the same manner and with the same duties and obligations.

The acceptance or nonacceptance by the chief of the new commission, with the added rank, under the act of March 2, 1899, will not change his official status or in any manner affect him.

DEPARTMENT OF JUSTICE,

May 18, 1899.

SIR: I have the honor to acknowledge yours of March 10, submitting for my opinion certain questions which have arisen under section 8 of the act increasing the efficiency of the Army of the United States, approved March 2, 1899, the said section being as follows:

“That the Chief of the Record and Pension Office of the War Department shall hereafter have the rank, pay, and allowances of a brigadier-general; and there shall be an assistant chief of said office, who shall have the rank, pay, and allowances of a major, and who may be appointed from civil life: *Provided*, That whenever a vacancy shall occur in the office of Chief of the Record and Pension Office subsequent to the passage of this act said grade shall cease and determine, and thereafter the chief of said office shall have the rank, pay, and allowances of a colonel.”

The law under which the Record and Pension Office of the War Department was established, and the office known as chief thereof created, is the act of Congress approved May 9, 1892 (27 Stat., 27), which reads:

“That the division organized by the Secretary of War in his office for the preservation and custody of the records of the volunteer armies under the name of the record and pension division is hereby established as now organized, and shall hereafter be known as the Record and Pension Office of the War Department; and the President is hereby author-

ized to select an officer of the Army whom he may consider to be especially well qualified for the performance of the duties hereinafter specified and, by and with the advice and consent of the Senate, to appoint him in the Army to be chief of said office, who shall have the rank, pay, and allowances of a colonel, and shall, under the Secretary of War, have charge of the military and hospital records of the volunteer armies and the pension and other business of the War Department connected therewith; and all laws or parts of laws inconsistent with the terms of this act are hereby repealed."

F. C. Ainsworth, the present Chief of the Record and Pension Office of the War Department, was appointed to that office in the Army on May 27, 1892, has continually held the office and performed its duties up to the present time, and was, of course, the incumbent of the office at the time the act of March 2, 1899, became the law.

Under the provisions of the act establishing this office the President was authorized to select an officer of the Army and, by and with the advice and consent of the Senate, appoint him to it; that is, to the office of Chief of the Record and Pension Office of the War Department. No matter what the grade of the officer selected may have been, when he was appointed, confirmed, and commissioned as Chief of the Record and Pension Office of the War Department he then by law became entitled to the rank, pay, and allowances of a colonel.

The act of March 2, 1899, does not create a new office; on the other hand, the office of Chief of the Record and Pension Office of the War Department remains the same, with the power vested in the President, in case of a vacancy, to select an officer of the Army to fill it and, by and with the advice and consent of the Senate, to appoint him. The said act only has the effect to change the rank, pay, and allowances of the incumbent of an office already established at the time the act was passed. It was therefore not necessary that there should be a nomination by the President and a confirmation by the Senate in order to entitle Ainsworth to the benefits of the act, for, as Chief of the Record and Pension Office, upon the approval of the said act he became

entitled to the rank, pay, and allowances of a brigadier-general instead of the rank, pay, and allowances of a colonel, as theretofore.

The distinction between the constitutional prerogative of the President to appoint to office and the right of Congress to increase rank and pay without encroaching upon this executive power is clearly drawn in *General Wood's Case* (15 Ct. Cls., 151), affirmed by the Supreme Court of the United States (107 U. S., 414). Thomas J. Wood was colonel of the Second Regiment of Cavalry in the Army of the United States, appointed in November, 1861, having in October previous been commissioned as brigadier-general of volunteers. In December, 1862, while in command of the left wing of the Fourteenth Army Corps, he was wounded at the battle of Stone River, and in September, 1864, while in command of the Third Division of the Fourth Army Corps, he was again wounded at the battle of Lovejoys Station. These divisional commands were the commands of a major-general. Wood was commissioned as a major-general of volunteers in January, 1865, and brevetted as a major-general in the Army in March, 1865. In 1868 Wood applied for retirement under the provisions of section 32 of the act of Congress of July 28, 1866, which section is as follows:

"That officers of the Regular Army entitled to be retired on account of disability occasioned by wounds received in battle may be retired upon the full rank of the command held by them, whether in the regular or volunteer service at the time such wounds were received."

The retiring board found that Bvt. Maj. Gen. Thomas J. Wood, colonel of the Second United States Cavalry, as a result of wounds received in battle while commanding a division of troops in the service of the United States was incapacitated for active service, which finding was approved by the President, and Wood was retired upon the full rank of a major-general. The Court of Claims, in the opinion in this case, uses this language:

"Rank is often used to express something different from office. It then becomes a designation or title of honor, dignity, or distinction conferred upon an officer in order to

fit his relative position with reference to other officers in matters of privilege, precedence, and sometimes of command, or by which to determine his pay and emoluments. This is the case with the staff officers of the Army. Section 1131 of the Revised Statutes provides that there shall be five inspectors-general with the rank of colonel of cavalry. The office thus provided for is inspector-general and not colonel of cavalry. The latter is a designation with entirely different legal effect from that which the same words express when used to describe an office—that is to say, he receives the pay and is entitled to the dignity, but has not the office with its command and other duties of a colonel of cavalry. In the same manner the Judge-Advocate-General has the rank of brigadier-general (Rev. Stat., sec. 1198) and chaplains have the rank of captains of infantry. (Rev. Stat., sec. 1122.) The Adjutant-General has the rank of brigadier-general and the assistant adjutant-generals the rank of colonel, lieutenant-colonel, or major of cavalry. (Rev. Stat., sec. 1128.) So with officers of the Quartermaster's Department and the Medical Department, who have rank attached to but separate and distinct from their office. (Rev. Stat., secs. 1132, 1168.)

“The distinction between rank and office is thus more clearly apparent with reference to staff officers than to officers of the line, because in the latter case the words used to designate the rank and the office are usually the same, while in the former case they are always different.”

And from the opinion of the Supreme Court of the United States affirming this decision I quote the following:

“The view of that court was that under the statutes of the United States in reference to the Army the office of an officer of the Army and his rank are not necessarily identical; that the office has a rank attached to it, expressed by its title, when no other rank is conferred on the officer; that the office remaining the same, the officer may have a different rank conferred on him as a title of distinction to fix his relative position with reference to other officers as to privileges, precedence, or command, or to determine his pay.”

I think the principle of law laid down in the Wood case settles the question now under consideration, and that is

that the act of Congress of March 2, 1899, did not in any manner affect the office of Chief of the Record and Pension Office of the War Department as a separate and distinct official position, but the said office remained the same as it was when established by law, to be filled in the same manner and with the same duties and obligations attached thereto. The incumbent of the office, however, by virtue of the act under consideration, was given a personal betterment by having his rank, pay, and allowances increased from those of a colonel to those of a brigadier-general.

The question presented by your letter arises from the fact that after the act of March 2, 1899, became the law F. C. Ainsworth was nominated by the President and confirmed by the Senate as Chief of the Record and Pension Office of the War Department with the rank of brigadier-general, and a commission as such has been prepared and tendered to Ainsworth. You say in your letter that it now becomes necessary for the Secretary of War to render a decision upon the following questions of law:

First. What will be the status of the present Chief of the Record and Pension Office as to rank, pay, and allowances if he does accept the new commission which has been issued for him?

Second. What will be his status as to rank, pay, and allowances if he does not accept the new commission?

After what I have said before it seems to be scarcely necessary that I should make further answer to the above interrogatories. As I stated, there was no office created by the act of March 2, 1899, nor did the said act make any vacancy in the office to which it referred, by which it became necessary for an appointment by the President by and with the advice and consent of the Senate.

I do not think, therefore, that the acceptance or nonacceptance of the commission which is tendered will change at all the official status of Ainsworth as Chief of the Record and Pension Office of the War Department. He is already the lawful incumbent of that office by appointment and confirmation heretofore under the provisions of the statute cited, and being thus its incumbent, he is entitled by the operation of the recent act to the rank, pay, and allowances of a brig-

adier-general in the United States Army, and the nomination, confirmation, and commission referred to will not in any manner affect him, whether he accepts the commission or refuses it. Under the circumstances the nomination and confirmation, as evidenced by the commission tendered, while not affecting the office of Chief of the Record and Pension Office of the War Department, are an expression on the part of the President and the Senate of approval of the action of Congress in increasing the rank and emoluments of the present incumbent. I have no doubt that for this reason the incumbent values this testimonial, and with this view I can see no harm that would result to him in accepting said commission.

When there is a vacancy in the office of Chief of the Record and Pension Office, occurring hereafter, then the increase of rank, pay, and allowances provided by the act of March 2, 1899, ceases, and the person succeeding to said office will be entitled only to the rank, pay, and allowances of a colonel, as provided in the act establishing the office, unless there should be further legislation upon the subject.

Very respectfully,

JAS. E. BOYD,
Assistant Attorney-General.

Approved.

JOHN W. GRIGGS.

The SECRETARY OF WAR.

APPOINTMENTS—MARINE CORPS.

A person who took the regular four years' course at the Naval Academy, and received a certificate of graduation, issued pursuant to the act of August 5, 1882, is a graduate of the Academy within the meaning of section 20 of the "navy personnel bill."

The exemption as to age limit with reference to the eligibility to appointment in the Marine Corps is not restricted to those who served in such corps, but extends to all graduates of the Naval Academy who served in the war with Spain.

DEPARTMENT OF JUSTICE,
May 19, 1899.

SIR: The act to reorganize and increase the efficiency of the personnel of the Navy and Marine Corps of the United

States, approved March 3, 1899, commonly known as the "navy personnel bill," contains the following provisions with respect to the Marine Corps:

"SEC. 19. That the vacancies existing in said corps after the promotions and appointments herein provided for shall be filled by the President from time to time, whenever the actual needs of the naval service require it—first, from the graduates of the Naval Academy in the manner now provided by law; or, second, from those who are serving or who have served as second lieutenants in the Marine Corps during the war with Spain; or, third, from meritorious non-commissioned officers of the Marine Corps; or, fourth, from civil life: *Provided*, That after said vacancies are once filled there shall be no further appointments from civil life.

"SEC. 20. That no person except such officers or former graduates of the Naval Academy as have served in the war with Spain, as hereinbefore provided for, shall be appointed a commissioned officer in the Marine Corps who is under twenty or over thirty years of age; and that no person shall be appointed a commissioned officer in said corps until he shall have passed such examination as may be prescribed by the President of the United States, except graduates of the Naval Academy, as above provided. That the officers of the Marine Corps above the grade of captain, except brigadier-general, shall, before being promoted, be subject to such physical, mental, and moral examination as is now, or may hereafter be, prescribed by law for other officers of the Marine Corps."

Under these provisions Ernest E. West has applied for appointment as a commissioned officer in the Marine Corps. Mr. West was born July 7, 1867, and is therefore over 30 years of age. He entered the Naval Academy as a naval cadet May 20, 1884, finished the four years' course in June, 1888, receiving a certificate of graduation, and resigned May 6, 1889, permission having been granted by his father December 7, 1888. It thus appears that he completed his four years' course at the Naval Academy, but resigned before he had completed the six years' course and taken the final examination. Mr. West was appointed an acting ensign May 14, 1898, for temporary

service in the Navy during the Spanish war, and was honorably discharged, with a creditable record, January 4, 1899.

In view of these facts, you submit for my opinion the following questions:

First. Is Mr. West to be deemed "a graduate of the Naval Academy" within the meaning of section 20?

Second. If so, did his service in the line of the Navy during the war with Spain avail, under the provisions of section 20, to exempt him from the age limitation for appointment to the Marine Corps? Or does such exemption extend only to those graduates of the Naval Academy who served as second lieutenants in the Marine Corps during such war?

1. Mr. West took the regular four-years' course at the Naval Academy, passed with credit the required examination at its completion, and received a certificate of graduation from the academic board, which was issued under the following provision of the act of August 5, 1882 (22 Stat., 284):

"Provided, That any cadet whose position in his class entitles him to be retained in the service may, upon his own application, be honorably discharged at the end of the four-years' course at the Naval Academy, with a proper certificate of graduation."

I am inclined to think that the completion of the four-years' course, and the receipt of the certificate of graduation thus provided for by law, constituted Mr. West a graduate of the Naval Academy within the meaning of the language of section 20. He was not a "final graduate" of the Naval Academy, entitled, under the law, to a commission in the Navy or Marine Corps. A careful reading of the statutes and regulations governing the Naval Academy satisfies me, however, that there are two kinds of graduation and two kinds of graduates. There is graduation and final graduation; there are graduates and final graduates. There are graduates of the four-years' course at the Academy proper entitled to certificates of graduation, and graduates of the six-years' course, four at the Academy and two at sea, entitled to commissions.

In the act of March 2, 1889 (25 Stat., 878), the phrases "final graduation" and "final graduate" are used throughout for the evident purpose of distinguishing the six-years'

course and those who have completed it and are entitled to commissions from the four-years' course and those who have completed it and have received certificates of proficiency in its studies. This use occurs in other statutes upon the same subject.

Section 20, after the age exemption to graduates who had served in the war with Spain, provides for an examination of all applicants for commissions in the corps "except graduates of the Naval Academy, as above provided." It was clearly the intention of Congress to encourage graduates of the Academy who had entered civil life to apply for appointment to the vacancies created by the increase in the Marine Corps. No examination was to be required, and the limitation as to age was removed. I can not but believe that it was education at the Academy and not service at sea which Congress had in mind in making these exemptions. The certificate of graduation at the end of the four-years' course was to be deemed ample evidence of proficiency in the branches of knowledge essential to qualify an applicant for a commission. The first question is therefore answered in the affirmative.

2. Section 20 provides that—

"No person except such officers or former graduates of the Naval Academy as have served in the war with Spain, as hereinbefore provided for, shall be appointed who is under twenty or over thirty years of age."

An examination of section 19 fails to disclose a reference to "former graduates of the Naval Academy as have served in the war with Spain." The phrase "as hereinbefore provided for" must therefore be taken to qualify the term "such officers," the reference being to the second class defined in section 19, namely, those who have served "as second lieutenants in the Marine Corps during the war with Spain." "Former graduates of the Naval Academy as have served in the war with Spain" are not mentioned in the favored classes described in section 19, which are:

First. "The graduates of the Naval Academy," the appointment to be made "in the manner now provided by law." These are graduates of the six-years' course entitled to a

commission under the law in force before the passage of the Navy personnel bill.

Second. "Those who are serving or who have served as second lieutenants in the Marine Corps during the war with Spain."

Third. "Meritorious noncommissioned officers of the Marine Corps."

"Graduates of the Naval Academy that have served in the war with Spain" come under neither of these classes. They come in the fourth class, from civil life, but are given by section 20 an exemption from the age limitation along with those who served as second lieutenants in the Marine Corps during the war with Spain.

The second question is therefore also answered in the affirmative. The exemption extends to all graduates who served in the war with Spain; it is not restricted to those who served in the Marine Corps.

Very respectfully,

JOHN K. RICHARDS,
Solicitor-General.

Approved.

JOHN W. GRIGGS.

The SECRETARY OF THE NAVY.

RIVER AND HARBOR APPROPRIATIONS.

The act of March 3, 1899, for deepening the channel north of Pelican Island, from Galveston Harbor to Texas City, Tex., makes an appropriation of \$250,000 for the work.

There is no authority for paying out of this appropriation any expenses for making the contract, inspecting or superintending the work, unless it be indirectly through a provision in the contract that these expenses shall be paid by the contractors and charged against their compensation.

DEPARTMENT OF JUSTICE,
May 20, 1899.

SIR: The river and harbor act approved March 3, 1899, contains the following provision:

"Deepening the channel from Galveston Harbor to Texas City, Texas: The Secretary of War is hereby authorized to enter into a contract or contracts for deepening the present

channel north of Pelican Island from Galveston Harbor to Texas City, Texas, to a depth of twenty-five feet and one hundred feet wide at the bottom, at a cost not to exceed two hundred and fifty thousand dollars, of which amount one hundred thousand dollars shall be paid whenever it shall satisfactorily appear to the Secretary of War, through army engineers, that said channel has been deepened to a depth of twenty-one feet, and the remainder of the price shall be paid when the whole work has been completed in a manner satisfactory to the Secretary of War."

In view of the peculiar language of this paragraph, you request my opinion as to whether an appropriation of \$250,000 is thereby made for this work.

The enacting clause of the river and harbor act of 1899 is:

"*Be it enacted, &c.*, That the following sums of money be, and are hereby, appropriated, to be paid out of any money in the Treasury not otherwise appropriated, to be immediately available, and to be expended under the direction of the Secretary of War and the supervision of the Chief of Engineers, for the construction, completion, repair, and preservation of the public works hereinafter named."

Then follow the various paragraphs specifying the particular works to be done, and in varying language the methods and conditions to be observed in carrying on the several works. The language of the paragraph relating to Galveston Harbor, above quoted, is peculiar, but taken in connection with the enacting clause of the act I think it does make an appropriation of \$250,000 for the particular work designated therein, and that the Secretary of War has power to make a contract or contracts therefor, and the money appropriated, not exceeding the sum mentioned, is available immediately for making payment under the contract or contracts whenever earned.

You ask further whether, in case your first question be answered in the affirmative, you can deduct any portion of the appropriated sum to pay the expenses of making the contract and inspecting and superintending the work, as is done and necessary to be done in all cases where work is carried on by contract under the authority of Congress.

The only power of expenditure out of this appropriation

is by way of contract or contracts for work specifically done. The money is not directly appropriated to be expended under the direction of the Secretary of War, but is directed to be expended through a contract or contracts to the maximum sum. I therefore think it is not proper and will not be permissible for you to pay out of this appropriation any expense of making the contract and inspecting and superintending the work, unless it be indirectly by means of a provision in the contract or contracts that these expenses shall be paid by the contractors, and charged against their compensation.

Very respectfully,

JOHN W. GRIGGS.

The SECRETARY OF WAR.

FORFEITURES—COMPROMISE—SUITS.

After a forfeiture has been adjudged or decreed it can not be remitted. Certain merchandise was seized and libeled under section 32 of the act of July 24, 1897. The United States attorney recommends the acceptance of an offer of claimants to compromise under section 3469, Revised Statutes, finding no fraud or irregularity on their part. *Held*, this is not a proper case for compromise under section 3469, Revised Statutes.

Under the primary, broad, and general control by the Attorney-General of suits in which the United States is interested, he is authorized to make such disposition of pending litigation, including the class of cases embracing the one at issue, as seems to him meet and proper.

He may absolutely dismiss or discontinue suits in which the Government is interested; *a fortiori*, he may terminate the same upon terms, at any stage, by way of compromise or settlement.

DEPARTMENT OF JUSTICE,

May 23, 1899.

SIR: I have the honor to acknowledge the receipt of your communication, of April 8, with its inclosure, relative to the forfeiture case of the *United States v. One Case of Watch Materials*, pending in the United States district court for the southern district of New York, from which it appears that the merchandise was seized and libeled under section 32 of the act of July 24, 1897 (30 Stat., 151), and was advanced in value upon appraisal more than 50 per cent

over the value declared in the entry; that the claimants have offered to compromise the case under section 3469, Revised Statutes, and that the United States attorney, finding no fraud or irregularity on their part, has recommended the acceptance of the offer; but that the Solicitor of the Treasury has declined to concur in the recommendation on the ground that the undervaluation was more than 50 per cent, and was not the result of a manifest clerical error, and the case is not, therefore, under the law, a proper one for compromise. The applicants contend, it appears, that the provision of said section, "and no forfeiture or disability of any kind incurred under the provisions of this section shall be remitted or mitigated by the Secretary of the Treasury," applies only to a decree of forfeiture and not to a suit in which the United States claims forfeiture. You therefore request my opinion on the question whether the case is a proper one for compromise under section 3469.

Section 32 of the act of July 24, 1897, amending section 7 of the customs administrative act, permits in the case of merchandise actually purchased an addition in the entry to the invoiced cost or value to make the market value abroad at the time of exportation, but does not require this addition and forbids it to be made where the merchandise has been obtained otherwise than by purchase; provides for appraisement in either case and for additional duties, not penal, when the appraised value of an article subject to an *ad valorem* duty exceeds the entry value, which additional duties shall not be remitted or refunded on any account except in cases arising from a manifest clerical error; and then provides as follows:

"*Provided*, That if the appraised value of any merchandise shall exceed the value declared in the entry by more than fifty per centum, except when arising from a manifest clerical error, such entry shall be held to be presumptively fraudulent, and the collector of customs shall seize such merchandise and proceed as in case of forfeiture for violation of the customs laws, and in any legal proceeding that may result from such seizure the undervaluation as shown by the appraisal shall be presumptive evidence of fraud, and the burden of proof shall be on the claimant to rebut

the same, and forfeiture shall be adjudged unless he shall rebut such presumption of fraudulent intent by sufficient evidence * * * *Provided further, That * * * no forfeiture or disability of any kind, incurred under the provisions of this section, shall be remitted or mitigated by the Secretary of the Treasury.*"

Has a forfeiture been *incurred* in the case before us, within the meaning of section 32, which may not be remitted or mitigated by the Secretary of the Treasury by compromise under section 3469?

Section 3469 provides:

"Upon a report by a district attorney, or any special attorney or agent having charge of any claim in favor of the United States, showing in detail the condition of such claim and the terms upon which the same may be compromised, and recommending that it be compromised upon the terms so offered, and upon the recommendation of the Solicitor of the Treasury, the Secretary of the Treasury is authorized to compromise such claim accordingly." * * *

It was held in the case of *United States v. Morris* (10 Wheat., 246) that under the act of March 3, 1797 (1 Stat., 506, now with subsequent amendments section 5292, Revised Statutes), the Secretary of the Treasury has power to remit a forfeiture after as well as before judgment of condemnation. This decision was approved and affirmed in the *Confiscation Cases* (7 Wall., 454, 461); but under the language of section 32 of the act of 1897, forbidding the remission or mitigation of a forfeiture, it is clear that after forfeiture has been adjudged or decreed it may not be remitted.

But the inhibition is against a forfeiture *incurred*. The concurring opinion of Justice Johnson in *United States v. Morris* (*supra*, p. 300) holds that "accrued" means something more than "incurred" and distinguishes the former from the latter by stating that a penalty does not accrue until conviction, and by intimating that it may be incurred even if suit is not brought, although elsewhere he announces that both terms technically relate to an actual judgment. Whatever ambiguity on the point may thus be cast over the language of the act of 1797, the present law in section 5292 preserves both terms, but confers upon the Secretary, in

cases coming under its provisions, the power to remit or mitigate a fine, penalty, or forfeiture, and to direct a prosecution to cease if one has been instituted, thereby showing clearly that Congress in germane legislation has used the word *incurred* as implying a liability only, and not as restricted to the status after judgment. The phrase "merchandise which has *become subject* to any seizure, forfeiture, or disability," in section 5292, confirms this view, and it is fortified in interpreting the existing law by the contrast between the use of the words "adjudged" and "incurred" in section 32 of the act of 1897. Furthermore, the force of the word "mitigate" in the prohibitory proviso contemplates a relief less than remission, as by settlement or compromise.

I am therefore constrained to hold that this case is not a proper one for compromise under section 3469.

evertheless, it is advisable to add, under the circumstances, that the primary, broad, and general control by the Attorney-General of suits in which the United States is interested, conferred by the statutes and established by decisions of the Supreme Court, of which the Confiscation Cases (7 Wall., 454,) may be mentioned, fully authorizes such disposition of pending litigation of the Government, including the class of cases which embraces the one before us, as seems to him meet and proper. He exercises superintendence and direction over United States attorneys and general supervision over proceedings instituted for the benefit of the United States, and to him is necessarily intrusted, in the exercise of his sound professional discretion and because of the nature of the subject, the determination of many questions of expediency and propriety affecting the continuance or dismissal of legal proceedings. (2 Op. 482, 486.) He may absolutely dismiss or discontinue suits in which the Government is interested; *a fortiori* he may terminate the same upon terms, at any stage, by way of compromise or settlement.

Holding this opinion, I am unable to share the doubt as to the authority of the Attorney-General to control prosecution for frauds upon the revenue intimated by my predecessor in the letter appended to 20 Opinions, 714.

Very respectfully,

JOHN W. GRIGGS.

The SECRETARY OF THE TREASURY.

CONTRACT LABOR—PHILIPPINE ISLANDS.

Certain natives of the Philippine Islands, not being professional actors, artists, or singers, within section 5 of the contract-labor law, are properly excluded, unless on other grounds they may be regarded as not within the prohibition of the law.

As the claim of these aliens for admission appears meritorious and no possible competition with American labor will be involved, and as they will be returned to their country in due time, there is no conclusive objection to the Secretary of the Treasury exercising his favorable administrative discretion in admitting them.

The law does not necessarily exclude all persons who do not come within its express exceptions if they are not manual laborers.

DEPARTMENT OF JUSTICE,
May 29, 1899.

SIR: I have examined the papers left with me by the Commissioner of Immigration with reference to certain natives of the Philippine Islands now at San Francisco and being held pending the determination of your Department as to their right to land in the United States.

It is clear from the evidence that these people are not "professional actors, artists, * * * or singers" within section 5 of the contract-labor law of February 26, 1885 (23 Stat., 332), and were properly excluded, unless on other grounds they may be regarded as not within the prohibition of the act. The Secretary of the Treasury has heretofore admitted Chinese actors, but on the peculiar considerations of the treaties with China and the exclusion laws, though in those cases the actors were presumably professionals, and it appears recently that the Secretary has excluded a similar band of Filipinos for exhibition purposes, although that case may be regarded as more meritorious than this, because the natives were a band of 40 musicians.

While it is true that in the case of various exhibitions acts of Congress were passed for the admission of similar aliens, which may be regarded as showing the extreme reluctance and care with which Congress has consented to make any exception to the exclusion provisions of the alien contract-labor laws, the fact that such acts were passed is not necessarily conclusive of this question. They may have been passed for other purposes—at the instance of foreign exhib-

itors in order that, for greater caution, their rights might be defined and protected, and for the purpose of legalizing and regulating a practice which notoriously involved numerous evils, among them the bringing of indiscriminate hordes of Asiatics, many of them against the prohibition of other laws and without effective provision for returning them to their homes.

The *Trinity Church* case (143 U. S., 457), admitting a rector of the Church of England on various general grounds as one not intended to be excluded by the legislature, notwithstanding the broad language of the statute, relies largely upon the purpose of the law to prevent foreign laborers of a low social stratum from entering this country to compete with and degrade American labor, and refers to the following language in the report of the House committee recommending the passage of the bill:

"Especially would the committee have otherwise recommended amendments, substituting for the expression 'labor and service' * * * the words 'manual labor' or 'manual service' as sufficiently broad to accomplish the purposes of the bill. * * * The committee, however, believing that the bill in its present form will be construed as including only those whose labor or service is 'manual' in character, and being very desirous that the bill become a law before the adjournment, have reported the bill without change."

The case of *United States v. Laros* (163 U. S., 258) held that a contract with an alien to come to this country as a chemist on a sugar plantation is not within the law; that the individual in question comes within the exceptions of the statute, which by amendment in the act of March 3, 1891, now includes ministers of any religious denomination, persons belonging to any recognized profession, and professors for colleges and seminaries. This decision relies chiefly upon the professional character of the service, but approves the general principles upon which the *Trinity Church* case was decided as to the purpose of the contract-labor legislation, and refers to the two grounds of the earlier decision, "the one that the act was clearly intended to apply only to cheap, unskilled labor, and the other that in no event could it be construed as applying to a contract for the services of a

rector. * * * The construction given to the words 'labor and service' by this court in the above case was neither forced, unnatural, nor unusual. Considering the clear purpose of the act, the construction adopted was a natural and proper one."

While the services of a nonprofessional actor or singer may be unskilled labor or service, it is evident that the court in the *Laws* case, as well as in the *Trinity Church* case, had in mind unskilled labor where the individual earns his wages by the labor of his hands; that is, unskilled, *manual* labor, emphasizing the fact that the measure was introduced and advocated by labor associations to shield the interests represented by them from the effects of competition in the labor market of foreigners brought here under contracts. This thought runs through both opinions, although the court in each case was regarding the contrast between the work of the manual laborer as distinguished from that of the professional man, rather than manual labor as distinguished from such unusual service as is presented in the *Filipinos'* case.

In the case of *United States v. Gay* (80 Fed. Rep., 254) the United States district court of Indiana sustained a demurrer to a declaration (giving leave, however, to amend) for the penalty under the contract-labor laws upon the ground of insufficient allegations that the immigrant came to this country pursuant to a contract and as to other matters, and held that the statutes in question, being highly penal, should be strictly construed, and should not be so construed as to include cases which, although within the letter, are not within the spirit of the law; that in view of the Supreme Court decisions, *supra*, the evil to be remedied must be chiefly considered, and the act limited to cases where the immigrant comes under a contract to perform "*manual* labor or service." From all the foregoing it may perhaps be safely inferred that, although there are express exceptions in the statute which do not include the case before us, not all people who are not manual laborers and yet are not within the express exceptions are necessarily to be regarded as excluded.

Although the Supreme Court decisions rested the case rather upon the high professional character of the service, they also invoked in effect the claim that the barred cases were limited to manual labor and service, while that broader ground was not alone necessary to the determination of the cases before the court. Here, however, in view of the principle indicated, and since the claim to admission appears to be meritorious in certain aspects, and no possible competition with American labor is involved, and since the aliens will be properly cared for and returned in due time to their own country (for which the Secretary may, under section 7 of the act of March 3, 1893, take suitable bond), it does not seem that the admission of the appellants would be without restriction or condition so as to constitute an abuse of the relaxation of the law, and therefore, if the Secretary deems it a proper case for the exercise of his favorable administrative discretion, upon the review on appeal now before him, no conclusive objection to that course is perceived.

Very respectfully,

JOHN K. RICHARDS,
Acting Attorney-General.

The SECRETARY OF THE TREASURY.

OPINIONS.

When the opinion of the Attorney-General is required, it is necessary that the facts be plainly stated and the questions upon which the opinion is desired should be specifically propounded.

The Attorney-General can not take the responsibility of examining the papers in a case and gather therefrom a conclusion as to what particular matters he shall pass upon.

DEPARTMENT OF JUSTICE,
June 7, 1899.

SIR: I have the honor to acknowledge the receipt of sundry papers which relate to an application of First Lieut. Lewis E. Brown, Ninth United States Volunteer Infantry, to set aside as void an order of Major-General Wood approving a court-martial sentence of dismissal, which took effect February 17, 1899. The application is indorsed with an opin-

ion by the Judge-Advocate-General, in which he reviews the various grounds upon which the application of Lieutenant Brown is urged, and advises that the order of General Wood approving the court-martial sentence is valid and can not be set aside by Executive order.

By your indorsement upon this paper it is "referred to the Attorney-General with request for opinion on the question presented by the Judge-Advocate-General of the Army."

The Judge-Advocate-General, in his opinion, does not present a specific question, but considers the various grounds urged in behalf of Lieutenant Brown's application, and disposes of them in accordance with his view of the law and practice applicable to such cases. It is impossible for me to know the precise question upon which my opinion is desired. When the opinion of the Attorney-General is required by the head of an executive department, it is necessary that the facts should be plainly stated and the questions upon which the opinion is desired should be specifically propounded. The Attorney-General can not take the responsibility of examining all the papers in the case and gathering therefrom a conclusion as to what particular matters he shall pass upon. Your attention is called to my opinion of February 4, 1899, in the matter of the application of George W. Harbaugh, and to opinions of various Attorneys-General, as follows: 20 Opin., 614, 640, 699, 711, 740, 742; 21 Opin., 36, 179, 202, 220.

As the papers are now submitted to me, therefore, I can not properly furnish you with any opinion upon the questions involved in the case.

Very respectfully,

JOHN W. GRIGGS.

Hon. G. D. MEIKLEJOHN,

Assistant Secretary of War.

VESSELS—PENALTY.

For violating section 2 of the law of August 2, 1882, providing that there shall not be in any compartment or space on a vessel occupied by "such passengers" (referring to emigrant passengers) more than two tiers of berths, nor more than one person in a berth not double, the master becomes liable to a fine of \$5 for each passenger carried other than cabin passengers.

DEPARTMENT OF JUSTICE,

June 8, 1899.

SIR: In your communication of June 5 you ask me whether, in a case of violation of the provisions of section 2 of the act of August 2, 1882, to regulate the carriage of passengers by sea, the master of the vessel becomes liable to a fine of \$5 for each passenger, including cabin passengers, carried or brought on the vessel, or a fine of \$5 only for each passenger other than cabin.

The inclosure accompanying your letter, upon which, in the absence of your own statement of the facts, I must rely, although somewhat contrary to the well-established rule of this Department, shows that the passengers in respect to whom the technical violation was committed were steerage passengers. The act in question is, upon its face, a measure for the protection of "emigrant passengers or passengers other than cabin passengers." These passengers are referred to as "such passengers" throughout sections 1 and 2 and in other sections of the act. Section 2 provides that there shall not be in any compartment or space occupied by such passengers more than two tiers of berths, and that each berth not double shall be occupied by not more than one passenger over 8 years of age. The section terminates with the provision, "For any violation of either of the provisions of this section the master of the vessel shall be liable to a fine of five dollars for each passenger carried or brought on the vessel."

Inasmuch as the act is for the protection of passengers other than cabin passengers, and the technical violation in this case related to such passengers, I am of the opinion that the phrase "each passenger" in the concluding portion of section 2 refers either to each steerage passenger as to whom there has been a violation of law—because, for instance, such passenger was lodged in a third tier of berths—or to all steerage passengers carried or brought on the vessel. I therefore conclude that the phrase "each passenger" is not to be read literally, and that at the most the fine should be imposed only for each passenger other than cabin passengers.

Very respectfully,

JOHN W. GRIGGS.

The SECRETARY OF THE TREASURY.

NAVIGABLE WATERS—HARBOR LINES.

The Secretary of War has the power to establish a harbor line for the Tacoma Harbor or modify the existing one in the harbor of Seattle, as he shall determine, if in his opinion the interests of commerce and navigation so require.

Congress has the power to establish harbor lines or modify existing ones in navigable waters within the limits of a State, although such State has already established such harbor lines.

The absolute power of Congress to regulate commerce, being without limit or extent, includes the power to regulate the use of all means and instrumentalities used in commerce, whether on sea, navigable rivers and lakes, in harbors or on land, irrespective of whether a State has attempted to regulate the same matter or not.

Commerce is not restricted to the purchase and sale of commodities, but includes also navigation, intercourse, and the reception, transportation, and delivery of passengers and freight by land and water, and also the means and instrumentalities used in such commerce.

Whenever Congress in the exercise of its power to regulate commerce makes any rule or regulation in harbors or elsewhere, whether in establishing harbor lines or otherwise, such regulations necessarily supersede any that the State may have made on the same subject within its limits.

The fact that harbor lines have once been established is no bar to the exercise of the same power as often as the needs of commerce require.

DEPARTMENT OF JUSTICE,

June 8, 1899.

SIR: I have the honor to acknowledge the receipt of your notes of July 21 and 28, 1898, with accompanying documents, in which you ask my opinion whether, in view of the facts there stated, the Secretary of War has authority "to establish a harbor line for Tacoma harbor, on the line proposed; and whether he has authority to modify the line for Seattle harbor, as proposed?"

As far as is material here the facts thus shown may be summarized as follows:

Some years since the State authorities established harbor lines in each of the harbors of Tacoma and Seattle, consisting of an inner and outer line, with a space between them about 600 feet wide, locally known as the "harbor area." This inner line closely follows the line of 30 feet depth of water, but is, in some places, in water of a greater depth, while the outer line is in water 40 feet deep and in some

places still deeper. The inner line is a fairly straight one, and is in a depth of water beyond which wharves can not be built at any reasonable cost. Inside the inner lines wharves, docks, etc., may be built by the owners of this front, but not beyond.

The State sold for very large sums the tide lands extending out to the inner line for purposes of wharves, etc., in aid of commerce and navigation, and the owners have built thereon extensive and expensive wharves and other structures for the commerce and navigation of that harbor, and which are used for that purpose. These were undoubtedly erected in reliance that the State would, without unreasonable exactions or interference, permit their owners to use them for the purposes for which they were intended, and for which the lands were then sold.

The State now claims and is about to exercise the right to lease this "harbor area" in front of those wharves, for the purpose of having other wharves erected thereon in front of the existing ones, and to the extent to which wharves are thus established in the "harbor area" they will cut off or interfere with the access to and use of those now existing within the inner line.

The contemplated leases are to run thirty years, at a rental based upon the appraised value of these lands in front, *together with the improvements thereon*, with the condition that within one year a wharf shall be erected on each of the leased premises, which are to be used only for the purpose of wharves. The State reserves the right to fix the rates for wharfage and also to cancel the lease at any time.

The owners of the property in front of this area are given the prior right to lease it upon the terms fixed by the State, but if they do not do so in a specified time the right to lease it is to be put up at public auction.

While the 30 feet of water along this inner line is practically the maximum depth in which wharves can be built at a cost which would warrant their erection, yet it is claimed that unless these front property owners lease this area, for which they have not any use, someone else will lease it, for either the purpose of destroying their business or as a specu-

lation to compel such owners to pay whatever may be exacted in order to prevent such destruction, and that the result is to compel them to thus pay tribute to the State for the privilege of using the property which the State sold to them for that very purpose. They also claim that as the rental is based upon the appraised value of this property fronting this area, including improvements which they have made, the more they improve their property the higher will be the rent they must pay for this other property for which they have no use.

I do not understand that any claim is made that the interests of commerce or navigation require this, or that there is any lack of room within the inner harbor line for all such wharves and other structures as the present or future needs of the harbors do or will require.

So far as is important here the situation in the two harbors in Tacoma and Seattle is practically the same, except that in Tacoma the United States Government has not established any harbor line, but has in Seattle, which line closely follows the outer line established by the State.

The whole trouble seems to have arisen from the attempt by the State to increase its revenues by the lease of this "harbor area."

In so far as this is a contention between the State and the owners of property within the inner harbor line in front of this "harbor area," and so far as it involves the question of the vested rights of these owners, or the right of the State *as between it and such owners* to thus lease the "harbor area" and compel wharves to be erected thereon, or the justice of its doing so, and independently of the effect of such action upon commerce and navigation, it would seem that the Secretary of War has no concern or jurisdiction in the matter. All these matters are for the courts to decide, and in which the Secretary of War can not intervene.

But by this I do not mean that, in determining whether he will establish a harbor line in Tacoma or change the existing one in Seattle, he may not in the interests of commerce and navigation, of which harbors, wharves, docks, etc., are a part, consider the effect of building wharves in front of

existing and sufficient ones, and of permitting this "harbor area" to be used for wharves, docks, etc., thus encroaching upon the space intended for vessels when not at dock, or whether needless and unreasonable exactions or requirements to the detriment of commerce are made or threatened as to any means of commerce in the harbor, or may not, in short, consider everything that may affect the use of the harbor for commerce and navigation, but simply that his action should be determined, not with reference to this contention between the State and individuals or between different individuals as to their property rights, but with reference to the interests of commerce and its present and future needs.

The question as to the power of the Secretary of War to establish harbor lines, or modify existing ones, involves other questions also.

First. Has Congress the power to do so, in navigable waters, within the limits of a State, and in this case, where the State has already established harbor lines?

Second. If Congress has this power, may it be exercised through the agency of the Secretary of War? Has Congress authorized the Secretary of War to execute this power in such a case as the one here in question? Is this objectionable as conferring legislative or judicial power upon the Secretary of War?

The first question, at least, seems to admit of little or no doubt. The conceded and unquestioned right of a nation to control, within certain limits, the waters of its coasts and the navigable waters within its territory would, of itself, be ample for this purpose.

Besides this, the Constitution, Article I, section 8, provides that Congress shall have power "To regulate commerce with foreign nations and among the several States and with the Indian tribes."

This grant of power to regulate commerce is general, absolute, and without limit, either as to the time, place, or the detail or extent of its exercise (*Gibbons v. Ogden*, 9 Wheaton, 1, 196), except, of course, waters whose entire adaptability for commerce is limited to the confines of a single State.

In delivering the opinion of the court in that case, Chief Justice Marshall said (p. 196):

"This power, like all others vested in Congress, is complete in itself. It may be exercised to its utmost extent, and acknowledges no limitations other than those prescribed in the Constitution. These are expressed in plain terms.

* * * If, as has always been understood, the sovereignty of Congress, though limited to specified objects, is plenary as to those objects, the power over commerce with foreign nations and among the several States is vested in Congress as fully as it would be in a single government, having in its constitution the same restrictions on the exercise of the power as are found in the Constitution of the United States."

But the same instrument that confers this power, imposes also certain specific restraints upon its exercise, so that both together result in the plenary power of Congress, except as thus limited in particular instances. And, as these limitations have no reference to matters here involved, we may treat the power of Congress in this respect as without limit.

This general and absolute control of Congress of the whole matter of commerce upon water, as it has always been exercised with the consent and sanction of every department of the Government, and therefore legally exercised, is tersely stated by Justice Miller, in delivering the opinion of the court in *Wisconsin v. Duluth* (96 U. S., 379). He says, page 383:

"It is to be observed * * * that the whole system of river and lake and harbor improvements, whether on the seacoast or on the lakes or the great navigable rivers of the interior, has for years been mainly under the control of that government, and that, whenever it has taken charge of the matter, its right to an exclusive control has not been denied."

And, speaking of certain acts of Congress for the improvement of the harbor at Duluth, he says, page 387:

"Nor can there be any doubt that such action is within the constitutional power of Congress. It is a power which had been exercised ever since the Government was organized under the Constitution. The only question ever raised has been how far and under what circumstances the exercise

of the power is exclusive of its exercise by the States. And while this court has maintained, in many cases, the right of the States to authorize structures in and over the navigable waters of the States, which may either impede or improve their navigation, in the absence of any action of the General Government in the same matter, the doctrine has been laid down with unvarying uniformity that when Congress has, by any expression of its will, occupied the field, that action is conclusive of any right to the contrary asserted under State authority."

And he refers, among others, to the following cases, which fully sustain the doctrine: *South Carolina v. Georgia et al.* (93 U. S., 4); *Pound v. Turk* (95 U. S., 459); *Gibbons v. Ogden* (9 Wheaton, 1); *Wilson v. The Blackbird Marsh Co.* (2 Pet., 345); *The Wheeling Bridge Case* (18 How., 421); *Gilman v. Philadelphia* (3 Wall., 713).

These cases and many others which might be cited, fully sustain this doctrine, and also that the power to regulate commerce includes the power to regulate the use of all the means and instrumentalities used in commerce, whether on the sea, the navigable rivers and lakes, in the ports and harbors, or on land, and entirely irrespective of whether a State has attempted to regulate the same matter or not. Indeed, outside of customs and revenue laws, the most of the regulations of commerce are those regulating the use of the means and instrumentalities by which it is carried on.

At this day it must be regarded as settled that commerce is not restricted to the purchase, sale, and barter of commodities, but that it includes also navigation, intercourse and the reception, transportation and delivery of passengers and freight, by land and water, and also the means or instrumentalities used in such commerce.

From the many cases affirming this the following may be cited with those above: *Gibbons v. Ogden* (9 Wheaton, 1, 196); *Cases of the Export Tax* (15 Wall., 232); *Pensacola Tel. Co. v. Wn. Tel. Co.* (96 U. S. 1, 9); *Gloucester Ferry Co. v. Pennsylvania* (114 U. S., 196, 203).

Then, as commerce includes navigation and as harbors are incidental and as essential to navigation as are vessels them-

selves, it is obvious that under this power Congress may establish and regulate harbors.

But harbor lines are often necessary to the use of harbors, and therefore may be established, defining and locating the part of the harbor upon or within which wharves, docks, piers, etc., may be built, and beyond which they shall not extend or encroach upon the place in the harbor assigned to vessels.

Probably this detail of the regulation of commerce is one of those in which the power of Congress is not exclusive, but may be exercised also in particular instances by the States until Congress sees power to act in such case. *Gloucester Ferry Co. v. Pennsylvania* (*supra*, p. 204).

But, whether done by State or Federal authority, all of these—defining the limits of the harbor, the location of wharves, docks, piers, etc.—with all that pertains to the reception, transportation, and delivery of passengers and freight in a harbor, are but details of the regulations of commerce, and must be done by some authority, or commerce in harbors—without which there can be no commerce by water—is without regulation and dead.

In view of our enormous commerce, the number and size of vessels engaged in it, the large area required for harbors, the number, extent, and capacity of the wharves, docks, piers, warehouses, and other structures absolutely necessary in our harbors, it is impossible to imagine the successful existence of commerce by water, without the exercise by some authority of this sovereign power of regulation in all these respects. And whatever power does this, does it as a regulation of commerce.

That this power to regulate, whatever it is, and whether limited, or without limit, is vested in Congress, whenever it sees proper to exercise it, can not be doubted either upon principle or authority; nor that it is as broad and extensive as commerce itself, and goes with it wherever commerce goes, on the high seas, the navigable waters, in the harbors and on land; and especially in the very places, where of all, it is the most needed, and without which, commerce by water is practically impossible. For it is obvious that it is chiefly in harbors and ports where regulations of commerce

are most needed and where the most of them apply. Out in the open sea, or during the voyage on the rivers and lakes, outside of landing places, but few of the regulations of commerce are needed or apply; and it is impossible to conceive of any practical, reasonable, or efficient code for the regulation of commerce which does not provide, first and chiefly, for such complete and detailed regulation in harbors and ports.

Nor is it necessary, for it is obvious that the power to regulate is as broad as the thing to be regulated.

Article VI provides that—

“This Constitution and the laws of the United States which shall be made in pursuance thereof * * * shall be the supreme law of the land, * * * anything in the Constitution or laws of any State to the contrary, notwithstanding.”

Therefore, whenever Congress, in the exercise of its power to regulate commerce, makes any rule or regulation, in harbors or elsewhere, whether in establishing harbor lines or otherwise, such regulation necessarily supersedes any that a State may have made, upon the same subject, within its limits.

It appears to have been contended by the representatives of the State before the board of engineers that, as the State had established harbor lines in the harbors of Tacoma and Seattle, the Federal Government could only accept or reject those, and could not establish a new one.

I am unable to see any ground upon which this contention can be sustained. If the power to regulate commerce includes the power to establish harbor lines, it may be exercised without reference to State action, and I have no doubt that, in establishing such lines, the General Government may do so either by adopting, in whole or in part, lines established by the State, or by making other and different lines.

It is probable that after these lines were established the owners of lands in front of them built wharves and other structures with reference to such lines and their continuance, which property may be damaged by a change of such lines; and doubtless, the Secretary of War, in determining whether,

how, and to what extent he will establish new lines, may consider all this upon the one hand against the needs of commerce on the other. But this is a matter of discretion, merely, and does not offset his power. This will be alluded to again.

It seems to have been claimed also that, as the Government had already established a harbor line in the harbor of Seattle, it could not now change it or make a new one.

I am not advised of the grounds upon which this claim was based. It may have been upon one or both of two grounds, which, in this case, would be closely connected.

First. That the power to establish harbor lines in a given harbor is limited to a single exercise, and is not a continuing power to be exercised as often as it is needed.

Second. That the Government having established a line out to and within which the riparian owners may build wharves, docks, etc., and such owners having, under this authority, built such structures at great expense in aid of the commerce for which the line was established, to now change the line so as to interfere with the use of such structures would interfere with vested rights; that in establishing such lines the Government invited and sanctioned these expensive works, and should not now interfere with their use.

The first ground may be easily disposed of.

First. There is no such limitation in the grant of power, which is general, without limit as to time or occasion, and, being a power to regulate commerce, is always such, no matter how often it has been exercised, and goes wherever commerce goes, lasts as long as commerce lasts, and is to be exercised as often as the needs of commerce require it.

Second. The nature of the subject includes and requires, not a power limited to a single exercise, but one as continuing as the commerce which it is to always regulate.

A harbor with limits and wharfage area quite ample for the needs of commerce twenty years ago may be insufficient now, and may require enlargement of the area and the reestablishment of harbor lines. The size and draft of vessels are ever increasing and requiring greater depth of water, while, on the other hand, harbors and channels are

subject to a decreasing depth by being filled up with silt, mud, and shifting sands. All these things, and very many more, imperatively require the continuance of this power to regulate this detail of commerce, and its exercise as often as it is needed.

Third. If it were necessary, it might be also pointed out that there is a vast difference in this respect between a power conferred upon a private individual or corporation, and to be exercised for private benefit, and one conferred upon Congress or an executive officer of the Government, and to be exercised for the common benefit of the nation. While in the former case such power is often exhausted by a single exercise, in the latter it is generally, unless otherwise limited, a continuing power, and may be exercised as often as the needs of its subject require.

It is doubtless true that the establishment by the Government of a harbor line, within and out to which wharves, docks, etc., may be built by riparian owners, is an invitation and authority by the Government for the erection of such structures in aid of commerce. But, in view of this continuing power and duty of Congress to regulate this detail of commerce, it must be taken that such structures are erected in view of, and subject to the exercise of, this power at some future time. And, in view of the frequently changing conditions which require changes of harbor lines, it can not be claimed that the establishment of such a line gives to anyone a vested right in its permanent continuance. Doubtless the existence of such structures under such circumstances and by such authority, their cost, size, character, and sufficiency, and the effect upon them of the establishment of a different line, are important factors to be considered and balanced against the needs of commerce for such change in determining whether such change shall be made.

But this does not affect the power, and if, after looking at both sides, it is deemed that the needs of commerce require such change, I can not doubt the power to make it, even though its exercise should affect injuriously riparian owners and their property.

Since the dates of the notes to which this is in response the statute upon this subject has been amended and the

matter is now governed by the river and harbor act of the last session of Congress, approved March 3, 1899.

Without entering into any detailed discussion of that act, it may be sufficient to say that section 17 thereof in express terms confers upon the Secretary of War authority to establish harbor lines whenever and wherever they are authorized by that act; and, under the authority thus conferred, I am of opinion that he is authorized to establish harbor lines, whenever the interests of commerce require them, to restrict the encroachment of wharves, piers, etc., upon the waters of harbors and to protect commerce therein; and this notwithstanding the objection sometimes urged that this and kindred legislation are attempts to confer legislative or judicial power upon heads of Departments or executive officers.

Referring to but two of the many cases which might be cited, and without entering into any lengthy discussion of what would or would not be objectionable as conferring or exercising legislative or judicial power, it is sufficient to say that this power to determine the necessity for and location of harbor lines in a given harbor is obviously no more obnoxious to this criticism than is the power to determine whether the East River Bridge in New York will, if built according to a proposed plan, obstruct or impair the navigation of that river. And the conferring upon the Secretary of War the power to determine this is distinctly upheld in *Miller v. Mayor of New York* (109 U. S., 385, 386, 394), in which Mr. Justice Field said, page 394:

“The act in question, in requiring the approval of the Secretary of War, was not essentially different from a great mass of legislation directing certain measures to be taken upon the happening of particular contingencies, or the ascertainment of particular information. The execution of a vast number of measures authorized by Congress and carried out under the direction of heads of Departments would be defeated if such were not the case. The efficiency of an act as a declaration of legislative will must, of course, come from Congress, but the ascertainment of the contingency upon which the act shall take effect may be left to such agencies as it may designate.”

And in *Wisconsin v. Duluth*, 96 U. S., 379, Mr. Justice Miller, speaking of this very power to regulate commerce by the improvement of harbors, says, page 383:

“The operations of the Government in this regard have been conducted by the Bureau of Engineering as a part of the War Department to which Congress has confided the execution of its wishes in all these matters.”

This delegation of the power is spoken of in these cases approvingly, and as within the constitutional power of Congress; and any objection upon the ground of conferring legislative or judicial power must now be too late, even if it would have had any force at any time.

I am therefore of the opinion that if the Secretary of War, in view of all the matters involved, is of opinion that the interests of commerce and navigation require the establishment of a harbor line in the harbor of Tacoma, or a modification of the existing one in the harbor of Seattle, he has the power to thus establish or modify, either upon my proposed line or as he shall determine.

I return herewith the documents transmitted with your note.

Respectfully,

JOHN W. GRIGGS.

The SECRETARY OF WAR.

FOREST SUPERVISORS AND RANGERS—ARRESTS.

The right of forest supervisors and rangers to arrest persons violating the laws or the rules and regulations for the protection of forest reservations being doubtful, it is suggested that relief must be had through Congressional action.

DEPARTMENT OF JUSTICE,

June 13, 1899.

SIR: I have the honor to acknowledge the receipt of your note of April 25, 1899, with its inclosed copies of correspondence, in which you ask my opinion as to the right of supervisors and rangers of the United States forest reservations to arrest thereon, without warrant, persons violating the laws or the rules and regulations of your Department for the protection of such reservations; and whether the Attorney-

General would suggest the appointment by United States marshals of such supervisors and rangers as deputy marshals, in order that they might make such arrests.

The statutes for the protection of these forest reserves seem singularly deficient in that they do not provide any efficient means for the arrest of persons violating the laws or the rules and regulations for the protection of these reservations. These laws, rules, and regulations afford little of the protection intended without some provision for the speedy arrest of persons violating them. The protection of these large territories is a difficult matter at best, and is substantially impossible without authority for the speedy arrest of persons committing depredations thereon, or otherwise injuring them, for in most cases, and in the worst, before complaint could be made, a warrant obtained and an officer to serve it, the damage would be done and the offender beyond reach.

I think that the right of the forest supervisors and rangers to make such arrests without warrant, even upon view of the offense, is, at least, too doubtful to warrant its exercise. While there is a line of authorities holding that a private person (and *a fortiori*, such an officer) may arrest on view for any violation of the criminal law, yet I think the better doctrine is as stated (2 Am. and Eng. Ency. L., 2d ed., 869):

"The Constitution of the United States declares that the people shall 'be secure in their persons, houses, papers, and effects against unreasonable searches and seizures,' and that 'no warrant shall issue but upon probable cause, supported by oath or affirmation and particularly describing the places to be searched and the persons or things to be seized.' Except in the cases where the public security requires it, an arrest without warrant has never been lawful; this exception has been recognized only in felony and in breaches of the peace committed in the presence of the one arresting."

Even if the marshals of the different districts would appoint these supervisors and rangers as deputy marshals, the same rule would apply to them.

This Department could not, with propriety, suggest to the marshals to make such appointments. The marshals appoint

their deputies; and are responsible upon their official bonds for the acts of such deputies, and might, naturally, decline to appoint persons of whose qualifications, fitness, or responsibility they are ignorant, and this Department could not, with propriety, suggest that they do so.

The remedy, if any, must be afforded by Congress, in authorizing forest supervisors and rangers to arrest persons found violating the laws or the rules and regulations enacted or provided for the protection of these forest reserves.

Respectfully,

JOHN W. GRIGGS.

The SECRETARY OF THE INTERIOR.

CUBA—CABLES.

The grounding of a cable upon the soil of the United States, with the intention of connecting our territory with foreign territory by that means, is a matter which is under the sovereign control of the Government, to be exercised by Congress, but in the absence of Congressional action to be regulated and controlled by the executive department of the Government.

The grounding of a cable upon the island of Cuba to connect it with a foreign country can not be done and maintained in opposition to the law of the Government which exercises sovereign power in the island. The authorities of the United States have full power, in their discretion, to prevent by all necessary means the grounding of a cable intended to connect the island of Cuba with the United States or any other country, or to remove or disrupt any cable which may be laid in disregard of its instructions and against its will.

DEPARTMENT OF JUSTICE,

June 15, 1899.

SIR: I am in receipt, by reference from you, of a letter from Mr. Mackay, president of the Commercial Cable Company of Cuba, dated May 31, 1899, asking for a reconsideration of the order made by the War Department to General Brooke on May 27, 1899, directing him to prevent the landing, by the Commercial Cable Company of Cuba, of a proposed cable in Cuba, to connect that island with the United States. You request my opinion as to the power of the War Department in the premises.

On February 27, 1899, application was made by the Commercial Cable Company of the United States for permission to land a submarine cable in Cuba and Porto Rico, for the purpose of effecting cable communication between those islands and the United States. This application was by you referred to me for an opinion in respect to the power of the Secretary of War in the premises. Under date of March 25, 1899, I advised you fully upon the subject, and you are respectfully referred to that opinion and to what is said therein with reference to this subject. Among other things, I said in that communication that the opinion of this Department is and has been that the grounding of a cable upon the soil of the United States, with the intention of connecting our territory with foreign territory by that means, is a matter which is under the sovereign control of this Government, such control to be exercised by Congress, but in the absence of Congressional action to be regulated and controlled by the executive department of the Government. *Super h 408*

The same principle is applicable to the island of Cuba, and the grounding of a cable upon the soil of that island, to connect it with a foreign country, can not be done and maintained in opposition to the will of the government which exercises sovereign power in the island. That power at the present time is the United States, and therefore the authorities of the United States have full power, in their discretion, to prevent by all necessary means the grounding of a cable intended to connect the island of Cuba with the United States or any other country. If the Commercial Cable Company of Cuba, in disregard of the instructions of the War Department and against its will, carries out its proclaimed purpose of landing its cable upon the island of Cuba to connect that island with the United States, you would be justified in using such force as is necessary to remove and disrupt it.

The foregoing sufficiently answers your request for my legal opinion as to your power in the premises. There are, however, some observations in the letter of Mr. Mackay which indicate on his part such a misunderstanding of private rights and public duties in connection with this subject that I think it may be useful to refer to some of them.

As tending to justify his intention of creating, either with

or without permission, a new line of cable communication between Cuba and the United States, he adverts to the fact that the Western Union Telegraph Company has now and for years has had a monopoly of the cable communication between these countries.

This Department has not assumed to pass upon the validity of the exclusive right which the Western Union Telegraph Company and its leased companies claim. They have formally notified the authorities of the United States of their claim under a concession granted by Spain, alleged to continue for forty years and not yet expired. The mere fact that the Western Union Telegraph Company is enjoying, under a grant of exclusive right, what amounts to a monopoly is no reason of itself why it should be deprived of its concession. It is easy to say that monopolies are odious, but there are concessions which amount to monopolies which are lawful, and can not be disturbed except by a violation of public faith. The laying and operation of cables, especially a quarter of a century ago, were attended with great expense and risk, and it was a very common thing for different nations, including the United States, to grant exclusive concessions for a term of years to companies that would undertake to invest the necessary capital and carry on such enterprises. With the chances of success the concessionaries took also the hazard of failure and loss. If loss ensued, they bore it; if success and profit, it was deemed proper to secure for a limited period to those who had risked the venture the enjoyment of the fruits of their enterprise, and not to allow other competitors who had not shared the risk to come in and take a share of the benefits. With the wisdom of such arrangements for exclusive franchises the Executive Departments are not concerned. The grants are made in this country by Congress, and in other countries by the constituted sovereign authority. It is the duty of those who administer the Government to deal with the conditions as they find them, and to see that legal rights of every nature are respected.

The granting of such concessions and their operation have, in many instances, been of great advantage to commerce and to the countries from which the concessions were derived.

To show the prevalence of this policy among different nations, I quote the following list of exclusive cable rights granted by different sovereignties:

England.—Exclusive rights have been granted or approved for the establishment of cables between Great Britain, France, Belgium, Holland, Germany, Norway, Sweden, Denmark, Spain, and Portugal.

Newfoundland.—An exclusive right for landing English cables was granted by Newfoundland and ratified by the British Government.

France.—An exclusive right for the establishment of an Atlantic cable connecting with the island of St. Pierre, off the coast of Nova Scotia. Preferential guaranties and subsidies for French telegraphic traffic to the French cables connecting with the United States, Haiti, and French West India Islands.

Spain.—Exclusive rights for the establishment of cables to the Canary Islands, Africa, and Brazil; also connecting Cuba with the United States, and Cuba with other West India Islands.

Portugal.—Exclusive rights for the cables connecting with Great Britain; also Brazil and the Azores.

Brazil.—Exclusive rights for connecting Brazil with the United States; also with Africa, Spain, and Portugal. Exclusive rights covering the whole coast of Brazil.

Peru.—Exclusive rights for cables northward from Peru.

Ecuador.—Exclusive rights covering the whole shore of Ecuador.

United States of Colombia.—Exclusive rights for the establishment of cables southward from the Isthmus of Panama.

Mexico.—Exclusive rights for the establishment of cables on the coast of the Gulf of Mexico and Pacific coast of Mexico.

Japan.—Exclusive rights for cables connecting Japan with China and Russia.

The United States.—The exclusive right for connecting the United States (coast of Florida) with Cuba and other West India Islands, by act of Congress approved May 5, 1866.

Concessions of this kind, which carry with them exclusive rights for a period of years, constitute property of which the concessionary can no more be deprived arbitrarily and without lawful reason than it can be deprived of its personal tangible assets. In a case in the Supreme Court of the United States (1 Wall., 352) Mr. Justice Field said:

“The United States have desired to act as a great nation, not seeking, in extending their authority over the ceded country, to enforce forfeitures, but to afford protection and security to all just rights which could have been claimed from the Government they superseded.”

If, therefore, the Western Union Telegraph Company has an exclusive grant applicable to Cuba for cable rights, which grant has not expired, it would be violative of all principles of justice to destroy its exclusive right by granting competing privileges to another company.

It is suggested, however, in Mr. Mackay's letter, that the grant which the Western Union Telegraph Company now holds, by lease or assignment, was obtained by fraud practiced on the Government of Spain, and that for that reason its grant is void.

Such an allegation can not be fairly and justly tried upon a proceeding like this. Neither the War Department nor the Department of Justice has power to summon witnesses or to give a judgment upon this question. It is essentially a question for judicial examination and decision, and to determine such a matter in a proceeding of this kind would not only be irregular, but contrary to the ordinary rules and procedure practiced in such cases. Vested rights which are property ought not to be taken from anyone, even upon charges of fraud, except by due process of law. Executive action by the War Department applied to subjects like this is not due process of law.

Mr. Mackay further submits that “the tremendous power of the Government should not be exercised against us.” It is the function of the Government to prevent, so far as possible, all infringement of the vested rights of others. Mr. Mackay, through his company, proposes to set up a competitive cable line, which he concedes will greatly injure the business of the Western Union Company, and although

the latter company produces a grant which, on its face, gives it an exclusive right for a period which has not expired, he requests this Government to stand idly by while he does, with the acquiescence of the United States, the very thing which the Government of Spain, our predecessor in the sovereignty of Cuba, solemnly agreed not to do or permit to be done.

I do not think that controversies as to grants and franchises derived from Spain, but exercisable within the island of Cuba or other islands derived by the United States from Spain, ought to be precipitated to a decision in the present unsettled condition that prevails in those islands. It is better to preserve, in all cases of doubt and difficulty, the present status until the full restoration of the civil régime and the establishment of permanent governments under which the rights of all can be duly and deliberately determined.

Very respectfully,

JOHN W. GRIGGS.

The SECRETARY OF WAR.

RIVER AND HARBOR IMPROVEMENTS—APPROPRIATIONS.

The Secretary of War has no authority to use any portion of the \$170,000 appropriated by the river and harbor act of March 3, 1899, for the improvement of the Missouri River above Sioux City, for improvements at or in front of that city.

DEPARTMENT OF JUSTICE,

July 8, 1899.

SIR: By indorsement upon the papers, under date of June 29, 1899, you request my opinion whether the Secretary of War is authorized to expend, in improvements at or in front of Sioux City, Iowa, any portion of the \$170,000 appropriated by the river and harbor bill of March 3, 1899, for the improvement of the Missouri River above Sioux City. In response I have the honor to submit the following:

The particular provision to which I am referred is on page 1147:

“Improving Missouri River: Continuing improvement above Sioux City to and including Bismarck, one hundred and seventy thousand dollars, to be expended in the discretion of the Secretary of War.”

The question is whether the phrase, "above Sioux City," includes or excludes that place and the river in its front. I have examined previous acts making appropriations for this river, below, at, and above Sioux City, and to some extent the history of this bill, in its passage through Congress, and have considered the fact stated, that, at the passage of this act, and now, an appropriation was and is greatly needed at Sioux City to protect existing Government works there, and have considered that Congress could not have been ignorant of this necessity.

When the bill went to a conference committee of the two Houses it contained a specific appropriation for Sioux City, but this was stricken out. The act, however, does contain an appropriation to be expended in front of South Sioux City, on the Nebraska side of the river opposite Sioux City, so that the attention of Congress was specially directed to this place, with the result stated above.

The question of what, in the light of all permissible facts, is the correct construction of the provision is a somewhat doubtful one; but, without entering upon what might be said in favor of either construction, I am of opinion that the popular, ordinary meaning of the words used should govern, and that this excludes Sioux City from the limits within which the appropriation is to be expended.

But as the question is a doubtful one it is suggested that the Secretary may withhold such portion as he would, if at liberty to do so, expend in front of Sioux City until the will of Congress can be known.

Respectfully,

JOHN W. GRIGGS.

The SECRETARY OF WAR.

CONCESSIONS—CUBA.

A concession in due form to construct certain tramways in the city of Havana was granted to one de la Torre in 1892, notwithstanding the objection of a rival company, which claimed the right under a royal decree of February 5, 1859, in which the right to grant new concessions was reserved to the Crown. Subsequently the same concession was advertised at public auction and sold to de la Torre, the rival company failing to bid. *Held*, the owners of the de la Torre concession have a *prima facie* right to proceed at their own risk, under the permission of the municipal authorities.

The military order of December 24, 1898, forbidding the making of any grant or concession in the future, was not intended to apply to those previously made in due form.

The military authorities have power to direct the municipal authorities to suspend public works and improvements for proper public reasons, even where such suspension interferes with rights that have previously vested.

DEPARTMENT OF JUSTICE,

July 10, 1899.

SIR: By letter of May 13, 1899, you referred to me the petition of one Juan M. Ceballos concerning a certain alleged concession or franchise for the construction of tram railways in the city of Havana, in the island of Cuba, therein specifically described. The petition sets forth that the concession for the construction of these tramways was obtained by proceedings in due and regular form of law and after due and proper fulfillment and performance of all the conditions and requisites of the law of Spain and island of Cuba applicable to street railways. It is represented that application for this concession was made in the year 1892 by petition in the manner prescribed by Spanish law, and that proceedings followed resulting in the public sale of the concession in 1893, at which the franchise was awarded to one de la Torre. Subsequently, de la Torre having died, further proceedings were had in the name of one Pla, the assignee of the de la Torre interests, so that finally a deed was duly executed by the alcalde of Havana by the direction of the city authorities, definitely granting the concession to P'a on December 10, 1898. The petitioner, Ceballos, the assignee of said Pla, at the time of the filing of the petition, was the owner of said concession. It appears from the papers that a corporation known as the American Indies Company has acquired, or is entitled to have by assignment from Ceballos, whatever rights pertain to the concession in question.

Under date of December 24, 1898, the following order of the President of the United States was promulgated by the major-general commanding the military forces of the United States in Cuba:

"Until otherwise ordered, no grants or concessions of public or corporate rights or franchises for the construction

of public or quasi public works, such as tramways, railroads, telegraph and telephone lines, waterworks, gasworks, electric-light lines, etc., shall be made by any municipality or other local governmental authority or body in Cuba, except upon the approval of the major-general commanding the military forces of the United States in Cuba, who shall, before approving any such grants or concessions, be so especially authorized by the Secretary of War."

The owners of the Torre concession, after the cessation of Spanish sovereignty in the island, applied to the new municipal council of Havana for permission to go on with the construction of their railways, which permission the municipal council granted, subject, however, to the approval of the military authorities.

At this point a competing company, known as the Ferro Carril Urbano y Omnibus de la Habana (Havana City Railway and Omnibus Company) intervened, and objected to the military authorities against the granting of such permission to the owners of the Torre concession, upon the ground that the Omnibus Company was possessed of an exclusive and prior right to build tramways through the streets contemplated by the Torre concession. General Ludlow, commanding the Department of Havana, reported that it was impossible for the administrative officers to determine, in view of the present status of this matter, as to whether Mr. Ceballos really owns the original Pla concession, or what rights the Omnibus Company has in respect of the same; that the contestants both claim validity of title to the concession, and both are asking for authority to proceed thereunder; that there was no means by which the legal rights could be ascertained other than by adjudication in the courts. He accordingly declined to approve the permission granted by the municipal council, and the owners of the Torre concession, being thus prevented by the military authorities from prosecuting the construction of their tramways, have now presented their petition, as aforesaid, to the Secretary of War.

You ask me to investigate and report upon the case, stating, as your official opinion, that after having looked over

the situation, Havana needs street railway facilities badly, and if under any franchise such works can be done and the money distributed in compensation for labor, the city would have the benefit of a modern system of railroads, which would be an excellent thing for the city.

By reference to the order of December 24, 1898, it will be perceived that the things prohibited were grants or concessions. It was directed that no municipality should, unless otherwise ordered, make any such grant or concession. This applied to the future, and did not and was not intended to apply to grants or concessions previously made in due form of law. If the concession of one or the other of these grants was completely made before the issuing of the order of December 24, then that order did not affect it. It was, and still is, undoubtedly within the lawful power of the military authorities to direct the municipal authorities to suspend public works and improvements for proper public reasons, even where such suspension interferes with rights that have previously vested. In view of the unsettled condition of affairs in Havana, consequent upon the war and the change of rule, it was most proper that the military authorities should look carefully into every work of a public or a quasi public nature which affected public right. (See my opinion in the matter of the claim of Michael J. Dady & Co.) In this case, however, the concession and the work to be done thereunder only indirectly affect the public interest, being prosecuted by a private corporation for private benefit, in no wise at public expense, and, in accordance with your opinion, it appears with great beneficial results to the city. There seems, therefore, to be no public reason why a grant of this kind, if complete and vested, should not be exercised. The only reason given by General Ludlow for withholding the necessary permission to proceed under the Torre concession is his doubt as to the conflicting claims of the two claimants. This is a matter relating in its effect solely to the interests of two private concessionaries. In a public sense, it is immaterial which one of them constructs and carries on the works, as in either event the city and the general public will receive the benefit arising from such improvements.

The question therefore presented is whether either of these claimants has such a *prima facie*, vested, and regular concession as to entitle it to be permitted to proceed and build the railways. This renders it necessary to consider what is disclosed by the papers with reference to the grants claimed by each. I have already set forth, in a general way, the claims of the owners of the Torre concession. Its rival, the Omnibus Company, claim under a royal decree granted February 5, 1859, under which they were authorized to construct certain city railways. By this decree the Government reserved to itself the power of granting new concessions, either as extensions or branches of those granted to the original concessionary, and contained this clause: "If the concessionee wishes to construct said extensions or branches, he will have the right or preference under equal conditions." The following facts seem to be admitted on both sides: When the original application was made in 1892 by Torre for his concession, the Omnibus Company objected to the grant. This objection was overruled, and the concession confirmed. Subsequently the concession was advertised at public auction, but the Omnibus Company failed to appear or make any bid, and the concession was sold to Torre. Torre having died, the municipal council of Havana, on December 4, 1895, recognized Pla as the owner by assignment of the Torre concession. On December 13, 1895, the municipal council resolved to notify Mr. Pla that he should make the requisite deposit in the municipal treasury, and that the work should be begun at once. Owing to the state of hostilities then existing in the island, notice of this resolution was not served on Mr. Pla, and the deposit was not made until November, 1898. Work to a greater or less extent was begun in December of that year under the Torre concession, which work was ordered to be suspended by the Spanish civil governor because of the unsettled condition of the country at that time, and perhaps by reason of the order of the President above quoted.

By a decree of December 7, 1898, one Dolz, secretary of public works and communications, assumed to make a decree, by authority of the autonomist government, authorizing a company called Empresa del Ferro-Carril Urbano de la

Habana—which I understand to be a company in the same interest as the Omnibus Company—to avail itself of the original concession of 1859, with rights identical to those granted by the municipal authorities to Mr. Pla.

There are various matters of disputed fact alleged between the parties which it is impossible to determine and decide specifically. But the facts which appear to be conceded on both sides seem to go to the effect that the Torre concession was granted in due form of law against the protest of the Omnibus Company, which would seem to indicate that the municipal authorities did not regard the reservation in the decree of 1859 as standing in the way of a valid grant or concession to another concessionary, at least where the Omnibus Company failed at the time to bid for the concession or to move to be substituted in place of the highest bidder. I think this fact gives to the owners of the Torre concession a *prima facie* right to proceed under their concession. The decree issued by Dolz on December 7, 1898, is subject to some suspicion, because it was through this same Secretary Dolz that the public sale of almost all conceivable public franchises in Cuba was advertised to take place in the latter days of December, just prior to the possession of the island by the United States forces, a scheme so obviously conceived in fraud as to have compelled the military authorities to put a stop to it. It further appears from the papers that the Omnibus Company, or some of their representatives, have so far recognized the validity of the Torre concession as to set up a claim that they are the equitable owners of it by purchase, attacking the title by assignment acquired by Mr. Ceballos. This would seem to justify still further the opinion that the Torre concession was valid and valuable, and that it is so known and understood by the claimants of the Omnibus Company's concession. The questions raised by some of the papers as to whether Mr. Ceballos obtained the assignment, which he undoubtedly possesses, by fraudulent conduct, is one which it is not necessary or proper to consider here, as whatever he may do under a fraudulent assignment will be done for the benefit of the equitable owner, and the courts can hereafter do justice between the parties in this respect.

Upon the whole, I am of opinion that the rights disclosed by the owners of the Torre concession are such as entitle them to be permitted, under the permission of the municipal authorities, to proceed with the beneficial work which they desire to construct without the injunction of the military authorities. This will not interfere with an adjudication in the courts of the ultimate and final rights of the parties. The action of the military authorities in withholding permission to proceed with the work is tantamount to a preliminary injunction in a court of law. Applying the same principles that would be applied in such a case if it was in a court of equity, I can see no reason why the owners of the Torre concession should not be permitted, at their own risk, to proceed with the work which they desire to construct, and I so advise you.

Very respectfully,

JOHN W. GRIGGS.

The SECRETARY OF WAR.

CUBA—MUNICIPAL REGULATIONS—PUBLIC WORKS.

On the cession of territory by one nation to another those internal laws and regulations of the former designated as municipal, continue in force and operation until the new sovereign imposes different laws and regulations.

The laws which are political in their nature and pertain to the prerogatives of the former government, immediately cease upon the transfer of sovereignty.

Any inchoate rights or grants made by a municipal body in Cuba under Spanish sovereignty, which for their completion require the assent or approval of the Crown or its officers, in the absence of such assent or approval made prior to the treaty of cession, are ineffective and incomplete.

In the exercise by the United States of the powers of municipal government it may change or modify the form or constituents of the municipal establishment, and in this exercise of sovereignty may provide the method, terms, and conditions under which internal improvements may be carried on, or forbid them to be carried on, although inchoate or even completed contracts therefor have previously been entered into. Any rights of Dady & Co. for the construction of certain works in Havana, if vested, are preserved by the treaty of Paris.

DEPARTMENT OF JUSTICE,

July 10, 1899.

SIR: Under date of June 16, 1899, you submitted to me the draft of a proposed order to the military governor of the island of Cuba relative to the construction of a system of sewers and the paving of the streets of Havana by a contract to be entered into by said municipality pursuant to the provisions of the Spanish law, and you request my opinion on the following questions:

1. Are the Spanish laws and regulations of municipalities in the dependencies of Spain now in force in Cuba as they existed at the time the island was relinquished by Spain?

2. Are the provisions of said laws and regulations, which required the assent and approval of the officers of the Crown of Spain to the various acts of the municipal authorities, now in force in Cuba?

3. Did the authority and power of said officers of the Crown of Spain, under said laws and regulations, pass to the officers of the United States now in charge of the government of civil affairs in said island, and may such authority now be exercised by said officers of the United States?

4. What direction and control over the action of the municipal authorities of Havana in the matter of engaging in the construction of public works for said city, by contract, may properly be exercised by the officers of the United States now discharging the functions of civil government in Cuba?

5. Has Michael J. Dady & Co., a corporation under the laws of West Virginia, any rights under the proceedings of the authorities in Havana relating to the matter of constructing said works according to plans and specifications prepared by said corporation and adopted by said municipality?

6. If said Michael J. Dady & Co., a corporation, has such rights, what are they, and are they preserved by the late treaty with Spain?

By well-settled public law, upon the cession of territory by one nation to another, either following a conquest or otherwise, those internal laws and regulations which are designated as municipal continue in force and operation for

the government and regulation of the affairs of the people of said territory until the new sovereignty imposes different laws or regulations. Those laws which are political in their nature and pertain to the prerogatives of the former government immediately cease upon the transfer of sovereignty. Political and prerogative rights are not transferred to the succeeding nation. Such laws for the government of municipalities in said territory as are not dependent on the will of the former sovereign remain in force. Such laws as require for their complete execution the exercise of the will, grace, or discretion of the former sovereign would probably be held to be ineffective under the succeeding power. So that any inchoate rights or grants made by a municipal body in Cuba while under Spanish sovereignty, which for their completion required the assent or approval of the Crown or of the Crown officers, would, in the absence of such assent or approval made prior to the treaty of cession, be ineffective and incomplete. The authority and power of the Crown and of the Crown officers in such instances did not pass to the officers of the United States, because the royal prerogatives and political powers of one Government do not pass in unchanged form to the new sovereign, but terminate upon the execution of a treaty of cession, or are supplanted by such laws and rules as the treaty or the legislature of the new sovereign may provide.

Cuba, however, is now under the temporary dominion of the United States, which is exercising there, under the law of belligerent right, all the powers of municipal government. In the exercise of these powers the proper authorities of the United States may change or modify either the form or the constituents of the municipal establishments; may, in place of the system and regulations that formerly prevailed, substitute new and different ones. Upon this line the same authorities, exercising sovereignty over the island, have the power to provide the methods, terms, and conditions under which municipal improvements, which relate entirely to property belonging to the municipality or held by it for public use, may be carried on. The old provisions of the Spanish law may be adopted, so far as applicable, or they may be entirely dispensed with and a new system set up in their place. The municipal authorities of Havana, in

the matter of engaging in the construction of public works, may be permitted to proceed under such law as is now applicable, if that be adequate, or they may, at the will of the military commander, be restrained from engaging in any such works, or from permitting any such works to be carried on, although inchoate or even completed contracts therefor have previously been entered into.

I do not deem it proper, nor am I able, to answer definitely your question as to whether Michael J. Dady & Co. have any rights under the proceedings of the authorities in Havana relating to the matter of constructing works according to plans and specifications prepared by said corporation and alleged to have been adopted by the municipality. If Michael J. Dady & Co. had, at the time the treaty of Paris was signed, any rights under their alleged contract which can properly be called vested rights, those rights are undoubtedly preserved by the terms of the treaty.

My view of the claim of Michael J. Dady & Co. has not changed from that expressed in my former opinion, under date of January 19, 1899. The practical question for the military authorities in Havana is whether it is advisable, as a public matter, and having in mind solely the public interests, to permit a contract which is concededly inchoate, which involves the expenditure of as much as \$13,000,000, and which involves the tearing up and disturbance of the streets of the city in a manner which may greatly endanger the public health, to be carried on at the present time. If the authorities were convinced that Michael J. Dady & Co. had a vested right or a complete contract it would be within their lawful province to suspend its execution if they thought the public health or other interests required. Of course such an interference with the exercise of a vested contract right would involve the payment hereafter of legal damages on account of such interference, but the public good would be the higher law and would justify the interference.

No one has a right to insist upon the specific performance of a contract for the improvement of streets in a municipality. A city may suspend or entirely abandon a project, although covered by a valid contract, subject only to the

right of the contractor, if damaged, to recover just compensation.

This matter, as now presented, seems to be one for administrative decision by the War Department. It might tend to elucidate the situation and guide the Department in its action if the commander in Cuba were directed to refer the subject to the civil authorities of the city of Havana, with directions to investigate the present status of the claim of Dady & Co., to determine whether it is for the interest of the city that the improvements contemplated by the plans of Dady & Co. should be carried out in the immediate future, or whether the project should be abandoned. In the latter case the civil authorities might be directed to further report whether, in the interest of the city, it was proper and advisable that the value of any rights which Dady & Co. have under the Spanish law should be appraised and paid to them. When the facts and the opinion of the civil authorities were thus obtained the War Department could direct action to be taken in such manner as might seem at the time to be most advisable. In case you determine it advisable that the matter should be referred to the civil authorities in the manner above suggested I recommend that the form of an order which is herewith inclosed be sent to the military governor of the island of Cuba.

Very respectfully,

JOHN W. GRIGGS.

The SECRETARY OF WAR.

NOTE.—The following cablegram was sent by the Secretary of War to the military commander of Cuba, pursuant to the foregoing opinion:

JULY 11, 1899.

Major-General BROOKE, etc.:

You are directed to refer the claim of Michael J. Dady & Co. to the civil authorities of the city of Havana, with instructions that they shall determine and report whether it is for the interest of the city that the improvements contemplated by the project and plans of Dady & Co. should be carried out in the immediate future, or whether the project should be abandoned.

In the latter case, the civil authorities to report whether in the interest of the city it is proper and advisable that the value of any rights which Dady & Co. have under the Spanish law should be appraised and paid to them.

When the report of the civil authorities is made let it be referred to me for consideration.

STAMP TAX—MORTGAGES—BONDS.

Bonds provided for in a mortgage, to be issued or not as the future action of the mortgagor may determine, are not until issued the subject of taxation or an element in estimating the amount of stamps required for the mortgage.

A bond, though prepared and signed, still in the possession of the obligor unissued, and which may never be, is not a debt or obligation which is liable to taxation.

As under the resolution of February 28, 1899, only one stamp is required upon two separate papers which constitute one transaction, as where a bond or note is given to evidence a debt and the mortgage executed to secure the same, the purposes of the law are fulfilled when the stamp in proper amount is affixed to either and canceled, such stamp being the highest rate required by said papers or either of them.

DEPARTMENT OF JUSTICE,

July 17, 1899.

SIR: I have the honor to acknowledge receipt of yours of May 13, 1899, inclosing a copy of a letter from the Commissioner of Internal Revenue, requesting my opinion as to the stamps required on a mortgage proposed to be executed by the Baltimore and Ohio Railroad Company and certain bonds, the payment of which is to be secured thereby.

These are the facts:

The directors and stockholders of the Baltimore and Ohio Railroad Company have approved the execution by the company of prior lien bonds to the amount of \$75,000,000, and the securing of the same by mortgage deed of trust to the Mercantile Trust Company of New York, trustee. Of this issue bonds to the amount of \$70,000,000 are to be presently issued and sold, and \$5,000,000 are reserved in the hands of the trustee to be issued and sold after 1902 at the rate of \$1,500,000 per year. The directors and stockholders of the railroad company have also approved and authorized the issue of first mortgage 4 per cent bonds of the company to the amount of \$63,000,000, secured by mortgage deed of trust to the United States Trust Company of New York, of which bonds \$50,000,000 are to be presently issued and sold. Six million dollars are reserved to take up a like amount of bonds of the Baltimore Belt Railroad Company, should the Baltimore and Ohio Railroad Company exercise its option to do so, and \$7,000,000 are reserved to be hereafter issued

and sold for the purpose of acquiring new equipments or otherwise adding to the mortgaged property.

In and by the mortgage deed of trust to the United States Trust Company the railroad company reserves the right to issue hereafter, for certain specified purposes, additional bonds to the amount of \$27,000,000, and it is provided that if and when these additional bonds are issued they shall be entitled to the security of the mortgage deed of trust *pari passu* with the other bonds issued thereunder. Neither the directors nor stockholders of the railroad company have approved or authorized the issue of these additional bonds.

Upon these facts the Commissioner of Internal Revenue in his letter to you submits these three interrogatories:

“(1) Must the stamps in this case be affixed to the bonds or to the mortgages?

“(2) If to the bonds, can such stamps be affixed to the bonds as issued, or can they be affixed to the mortgages as the bonds are issued?

“(3) If the stamps are to be affixed to the mortgages, must the amount of the same be equal to the entire tax on the bonds provided for by said mortgages?”

The several provisions of law involved in the consideration of the questions are—

That portion of the first paragraph of Schedule A of the act of June 13, 1898, which reads as follows:

“Bonds, debentures, or certificates of indebtedness issued after the first day of July, anno Domini eighteen hundred and ninety-eight, by any association, company, or corporation, on each hundred dollars of face value, or fraction thereof, five cents.”

That part of Schedule A which says:

“Mortgage or pledge of lands, estate, or property, real or personal, heritable or movable, whatsoever, where the same shall be made as a security for the payment of any definite and certain sum of money, lent at the time or previously due, and owing or forborne to be paid, being payable; also, any conveyance of any lands, estate, or property whatsoever, in trust to be sold or otherwise converted into money, which shall be intended only as security, either by express stipulation or otherwise; on any of the foregoing

exceeding one thousand dollars, and not exceeding one thousand five hundred dollars, twenty-five cents; and on each five hundred dollars, or fractional part thereof, in excess of fifteen hundred dollars, twenty-five cents."

The following resolution of Congress, approved February 28, 1899:

"That an act passed June thirteenth, eighteen hundred and ninety-eight, entitled 'An act to provide ways and means to meet war expenditures, and for other purposes,' be amended by adding to the end of Schedule A, section twenty-five, the following: 'Whenever any bond or note shall be secured by a mortgage or deed of trust, but one stamp shall be required to be placed upon such papers: *Provided*, That the stamp tax placed thereon shall be the highest rate required for said instruments, or either of them.'"

And also section 15 of the act of June 13, 1898, which is as follows:

"That it shall not be lawful to record or register any instrument, paper, or document required by law to be stamped unless a stamp or stamps of the proper amount shall have been affixed and canceled in the manner prescribed by law; and the record, registry, or transfer of any such instruments upon which the proper stamp or stamps aforesaid shall not have been affixed and canceled as aforesaid shall not be used in evidence."

The main question presented by the facts in this case and interrogatories submitted thereon by the Commissioner of Internal Revenue is as to the amount of stamp required under the provisions of the war-revenue act, at the time the mortgage is offered for registration, upon the transaction described.

There is no trouble in arriving at the amount of tax required upon a bond for a certain sum, because that is definitely ascertained by the statute, being governed by the sum stated on the face of the bond. The difficulty, if there be any, in the present case arises because the property conveyed in the mortgage is not in fact security at the time the mortgage is offered for registration for the payment of the full amount of bonds provided for, the issue of some of the bonds being made dependent upon future contingencies. If

the company, by the action of its directory, decides to issue at one time bonds to a definite amount, and at the same time executes a mortgage upon its property as security for the payment of these bonds as they become due, the stamp tax required could be readily estimated. But in the matter under consideration such is not the case. Certain of the bonds provided for in the mortgage are ready to be issued at the time the mortgage is offered for registration; certain others of the bonds are held in reserve by the company, and the issue of still others depends upon future contingencies, which may or may not happen. The law says that the instrument which is taxable is a *mortgage of lands, estate, or property, etc., where the same shall be made as a security for the payment of any definite and certain sum of money, lent at the time or previously due and owing or forborne to be paid, being payable.* Evidently the law intended to determine the amount of tax to be paid upon a mortgage by the amount of debt actually incurred and existing, and for the payment of which the property conveyed is security. Certainly a bond, though prepared and signed, still in the possession of the obligor, unissued, and which may never be issued, is not a debt or an obligation. Such bond can not be construed as an evidence of a *definite and certain sum of money, lent at the time or previously due and owing or forborne to be paid, being payable.* In such instances the bond is operative when it is issued and goes into the hands of a lender or purchaser, and is held as evidence of an obligation to pay the sum of money indicated by its terms.

I do not deem it necessary to discuss the question as to bonds provided for in the mortgage to be issued or not as the future action of the mortgagor may determine. My conclusions above apply, and such bonds can not, until they are issued, be the subject of taxation or an element in estimating the amount of stamp required for the mortgage.

Under the provisions of the war-revenue act relative to bonds, and mortgages executed as security for the payment of the same, both the mortgage and the bond were taxable, and consequently, in cases like the one under consideration, it was with some difficulty that a definite ruling could be established, more particularly because the mortgage required

stamps to a certain amount and the bonds stamps of a different amount.

Now, under the resolution of Congress approved February 28, 1899, above quoted, which is an amendment to the provisions of the war-revenue act in respect to mortgages and bonds and notes secured thereby, the stamp is not required upon each of the instruments, but only upon the transaction evidenced by both instruments, the amount of said stamps to be the highest rate for said instruments or either of them. This amendatory resolution not only changes the law so as to require but one stamp, but upon a perusal of the same it will be seen that it provides that this one stamp may be placed on either of the papers, the language of the law being this:

"Whenever any bond or note shall be secured by a mortgage or deed of trust, but one stamp shall be required to be placed *upon such papers.*"

It seems that there can be but one conclusion as to the meaning of this language, and that is that the placing of the requisite stamp upon either of the papers fulfills the requirements of the law, such stamp being of the highest rate required by said papers or either of them.

The only provision of law I find which appears to stand in the way of this conclusion and its practical application is section 15 of the war-revenue act, copied above. It will be observed that this section says:

"That it shall not be lawful to record or register any instrument, paper, or document required by law to be stamped unless a stamp or stamps of the proper amount shall have been affixed and canceled in the manner prescribed by law."

Anterior to the resolution of February 28, 1899, when, as I have stated before, both the mortgage and bond or note for which it was given as security were subject to tax, a mortgage offered for registration should have had the proper stamp affixed and canceled. But now, when the law is so amended as to require only one stamp upon two separate papers which constitute one transaction, it is my opinion that the purposes of the law are fulfilled when the stamp in proper amount is affixed to either and canceled. I have

used the expression "two separate papers" above in contemplation of the fact that in ordinary business transactions one bond or note is given to evidence a debt and a mortgage executed to secure the same, but the same principle will apply where the debt or obligation is evidenced by several bonds secured to be paid by the mortgage.

I think that I have sufficiently covered the ground and have answered the several questions propounded by the Commissioner of Internal Revenue.

Respectfully,

JAS. E. BOYD,
Acting Attorney-General.

The SECRETARY OF THE TREASURY.

VOLUNTEER ARMY—OFFICERS—COMMISSIONS.

Organizations of State militia, received as a body into the service of the United States as a part of the Volunteer Army under the act of April 22, 1898, are to be maintained as received, and the officers of the same are entitled to enter the service with the grades which their commissions severally indicate.

Although such troops retain their distinctive features as State organizations, the governor of the State from which they came can not subsequently displace an officer holding his commission at the time the organization entered the service of the United States, but he might fill any vacancy occurring in it.

A regiment so entering the military service of the United States has the right to maintain its organization with the number and grade of officers authorized by the laws of the State from which it came.

An officer commissioned by the governor of a State to fill a vacancy as major occurring in such regiment in the field need not be mustered into the service of the United States, he having originally been mustered into the service with the regiment as a captain.

DEPARTMENT OF JUSTICE,

July 18, 1899.

SIR: I have the honor to acknowledge your favor of the 15th of June ultimo, inclosing certain communications from the governor of Minnesota, in which you request my opinion upon the following state of facts:

On the 7th of May, 1898, pursuant to the call of the President issued under the provisions of the act of April 22, 1898, the First Regiment of the Minnesota National Guard, an existing military organization of said State, was tendered by

the governor of the State and accepted by the United States as the Thirteenth Regiment of Minnesota Volunteer Infantry. This regiment had been organized and officered under the provisions of the military code of Minnesota, and at the time it was tendered to the United States and accepted for service in the Volunteer Army there were three majors duly commissioned by the governor who were a part of the roster of the organization. These three majors were entered upon the army rolls of the United States according to their grade as such and as indicated by their several commissions from the governor. The regiment has been in active service, is now in the Philippine Islands, and, in the vicissitudes of war, a vacancy has occurred in one of the majorships, leaving still two majors to the regiment. To fill the vacancy in the third majorship, the governor of Minnesota, on the 26th day of May, 1899, issued a commission to Joseph P. Masterman, who at that time was a captain and in command of Company K in said regiment.

Upon these facts you request to be advised "whether or not the governors of the several States are entitled, under the provisions of the act of March 2, 1899, 'for increasing the efficiency of the Army of the United States, and for other purposes,' to make additional appointments in the volunteer regiments organized and mustered into the United States service under the act of April 22, 1898, so as to make such volunteer regiments still remaining in service correspond in their organization to the organization of regiments in the Regular Army, as authorized by the former act, and whether, if such additional officers are appointed by the governors, the law requires that they shall be mustered into the United States service."

I do not think that the question presented upon the state of facts given is confined to whether the provisions of the act of March 2, 1899, apply. It seems to me that the real question arises upon the construction to be given to the second proviso of section 6 of the act of April 22, 1898, which section provides as follows:

"That the Volunteer Army and the militia of the States, when called into the service of the United States, shall be organized under, and shall be subject to, the laws, orders,

and regulations governing the Regular Army; * * * *Provided further*, That when the members of any company, troop, battery, battalion, or regiment of the organized militia of any State shall enlist in the Volunteer Army in a body as such company, troop, battery, battalion, company, or regiment, the regimental, troop, battery and battalion officers in service with the militia organization thus enlisting may be appointed by the governors of the States and Territories, and shall, when so appointed, be officers of corresponding grades in the same organization when it shall have been received into the service of the United States as a part of the Volunteer Army."

Under this provision of the law the Minnesota regiment was mustered into the service of the United States in a body as a regiment of the organized militia of said State, and the regimental and company officers holding commissions from the governor were recognized and accepted by the authorities of the United States and entered upon the army rolls of the United States according to their grades, as indicated by their several commissions. Included among these commissioned officers were three majors who were appointed and commissioned by the governor under the provisions of the military code of said State. At the time, however, that the regiment went into the service of the United States the laws governing the Regular Army of the United States authorized only two majors to a regiment.

I understand the purpose of the proviso in section 6 of the act of the 22d of April, 1898, above quoted, to have been that where there was an existing organization of State militia, organized and officered according to the laws of the State, which was tendered to the United States under the President's proclamation for service as a part of the military force of the Government in the war with Spain, in a body, as a completed organization, the officers provided by the State laws were, when so commissioned by the governor, to enter the service of the United States with grades corresponding to the grades named in their several commissions. The number and grade of commissioned officers in such organizations to be recognized by the Federal authorities depended entirely upon the law of the State from which an

organization came, and the persons holding commissions from the governor of the State, issued under the authority of the law, were to constitute the commissioned officers of the organization while in the service as a part of the Volunteer Army. I think the language of the proviso is plainly capable of the construction that existing State organizations, such as are being considered, which were accepted or enlisted in a body by the United States, are excepted, so far as said proviso affects the number and grade of the commissioned officers of the organization, from the operation of the first clause of the section, and that the exception not only applied at the time the organization entered the service of the United States but is continuing.

That such was the intention of the lawmakers is apparent from the fact that the first paragraph of section 6, above quoted, directs that the Volunteer Army and militia of the States, when called into the service of the United States, shall be organized under and shall be subject to the laws, orders, and regulations governing the Regular Army, and closely following is the proviso in said section authorizing the United States to accept in a body completed State organizations, with officers bearing the commissions of the governors, such officers, when in the service of the United States, to continue to hold severally the grades named in their commissions.

I have already held, in an opinion previously rendered to you (September 26, 1898), involving the question of the right of the governor of Missouri to appoint a captain in the Fifth Missouri Volunteer Infantry after the said regiment had gone into the Volunteer Army of the United States, that troops furnished by the States under the provisions of the act of April 22, 1898, although temporarily a part of the Volunteer Army of the United States, retain their distinctive features as State organizations, and while a governor could not subsequently displace an officer holding his commission at the time the organization to which such officer belonged entered the service of the United States, yet, in case of a vacancy occurring, it was the province of the governor of the State from which the regiment came to fill it.

I do not believe the legislation under consideration will

bear the construction that it only applies to a State organization at the time such organization is accepted for service in the Army of the United States under the provisions of the Volunteer Army act.

We have the right to assume that Congress had some wise purpose in view when it modified the first clause of section 6, as is done by the second proviso. I do not think it fair to conclude that the object was only to provide in the outset for officers who might be found in existing organizations of State militia. On the other hand, it is more reasonable to conclude that such organizations were to go into the Federal service intact, and thus preserve their autonomy or the features of organization which pertain under the laws of the State from which they come. It certainly could not have been the intention of Congress to have one of these organizations go into the Federal service, organized and officered under the laws of the State from which it came, and as soon as its roster was broken by the casualties of war or other causes to take away from it one of its distinguishing statal features. I think it must follow, therefore, that these organizations were to be maintained as they were received, and I can see no sound reason in the proposition that the proviso in section 6 to which we are referring was only intended to apply at the time a State organization was accepted for service by the United States, and to continue in force only so long as the officers then holding commissions remained. I hold that under the proviso of section 6, by virtue of which this Minnesota regiment was accepted (or enlisted, as it is termed in the statute) as a body by the United States for service as a part of the Volunteer Army, the officers of said regiment holding commissions issued to them by the governor of the State, under the authority of the laws of the State, were entitled to enter the service of the United States with the grades which their commissions severally indicated, and that said regiment, with its said officers, although temporarily in the military service of the United States and constituting for the time a part of the Volunteer Army of the United States, still remains a regiment of Minnesota militia, and as such, under the laws of Minnesota, and by virtue of the condition under which the regiment entered

the service of the United States—that is, that it should retain the number of officers with the grade which the law of the State provided—has still reserved to it the right to maintain its organization with the number and grade of officers authorized by the laws of the said State.

The act of March 2, 1899, while, as I have stated, having in my opinion no direct application to the question I am considering, yet may be cited to sustain the position that a third major is not an unnecessary officer in an infantry regiment, because the said act, which is intended to increase the efficiency of the United States Army, provides for three majors to a regiment instead of two, as under the previous law.

As to whether it is necessary to muster Masterman (who has been commissioned as major by the governor) into the service of the United States, I do not see that it is. Masterman entered the service, as seems to be the fact, when the regiment went in; he has been a commissioned officer in the regiment during the whole of its active service. He has therefore already been mustered in, as it is termed, and I can see nothing left to be done except, upon its being made satisfactorily to appear to the authorities of the United States that he is duly commissioned by the governor of Minnesota as major of the Thirteenth Regiment of Minnesota Volunteer Infantry, to fill a vacancy which has occurred therein, that his name be entered upon the Army rolls as an officer of that grade from the date of the acceptance by him of said commission.

I return inclosures as requested.

Respectfully,

JAS. E. BOYD,
Assistant Attorney-General.

Approved.

JOHN W. GRIGGS.

The SECRETARY OF WAR.

DUTIES—WRECK.

The merchandise taken from the wrecked steamer *Paris*, both hull and cargo of which were abandoned to the underwriters, the cargo being lightered from the wreck to the nearest available vessel of the same line, thus completing the interrupted voyage, may be regarded as merchandise taken from a wreck and entitled to entry by appraisement, under section 2928, Revised Statutes.

The provision of section 23 of the customs administrative act relieving the importer from the payment of duties on damaged goods by abandoning them to the United States refers to loss or damage arising from ordinary causes during the voyage, and not to the case of a wreck and loss or damage thereby.

DEPARTMENT OF JUSTICE,

July 26, 1899.

SIR: You inform me in your communication of July 18 that an application has been made on behalf of the importing underwriters to enter by appraisement under section 2928 of the Revised Statutes certain merchandise taken from the wrecked steamer *Paris*, cast away on the Manacles, off the south coast of England, during her voyage from Southampton to New York on May 21 last. The *Paris* was en route and laden for the port of New York when cast away, and both hull and cargo were abandoned to the underwriters and paid for at full insured value. It is to be assumed from your statement that the cargo was lightered from the wreck to the nearest available vessel of the same line, thus completing the interrupted voyage.

From these facts you request my opinion as to whether the merchandise in question may be properly regarded as merchandise taken from a wreck and entitled to entry by appraisement under section 2928 of the Revised Statutes.

In reply I have the honor to state that said section provides that "before any merchandise which may be taken from any wreck shall be admitted to an entry, the same shall be appraised and the same proceedings shall be ordered and executed in all cases where a reduction of duties shall be claimed on account of damage which any merchandise shall have sustained in the course of the voyage" * * * .

It is provided by section 23 of the customs administrative act that "no allowance for damage to goods, wares, and

merchandise imported into the United States shall hereafter be made in the estimation and liquidation of duties thereon," but the importer may be relieved from the payment of duties on any or all such goods by abandonment thereof to the United States. This provision of the customs administrative act, however, in my opinion, refers to loss or damage arising from ordinary causes during the voyage, and not to the special and extreme case of a wreck and loss or damage thereby. This view is confirmed by the fact that the repealing section of the customs administrative act repeals those sections of the Revised Statutes which relate to the first kind or measure of loss and damage, such as mere deterioration in the condition or quantity of shipped goods arising from casualties or circumstances less than wreck, but does not repeal section 2928, allowing special entry and proceedings by appraisement in case of wreck.

Further, the last paragraph of section 29 of the customs administrative act provides that nothing in the act shall be construed to repeal the existing provisions of law in respect to the abandonment of merchandise to underwriters or the salvors of property, and the ascertainment of duties thereon, as to the bearing of which provisions on the question before us I refer below.

From the foregoing it seems to me evident that Congress, while abolishing the ordinary damage allowance, did not intend to rescind the authority given in section 2928 for the special case of merchandise taken from a wreck. This view appears to be in accord with the practice of your Department, for decision S. 12061, under which entry and appraisement of merchandise wrecked upon a lighter during transport to a vessel outward bound from a foreign port to the port of New York was allowed, was rendered after the customs administrative act went into effect.

There can be no question in the present case that the wreck occurred in the course of the voyage which ended in the importation of the goods into the United States, and that the transshipment to a vessel of the same line bound to New York did not constitute a reshipment or prevent the application of the statute's remedy. The loss by wreck was quite clearly sustained in the course of the voyage. In this

respect the case is even stronger than that considered in S. 12061.

In the opinion of my predecessor (21 Opin., 121) the cargo and vessel after the wreck were taken back to the port of departure and started therefrom *de novo*, upon which ground alone it was held, since the wreck did not occur in the course of the voyage which ended in the importation of the goods into the United States, that entry was not allowable.

It appears to me, further, that section 3058 of the Revised Statutes, as amended by the act of February 23, 1887 (1 Supp. Rev. Stat., p. 542), has a material bearing upon the question as showing the purpose of Congress relating to such merchandise. That section provides for the recognition of the underwriters as consignees of merchandise abandoned to them (as does also section 1 of the customs administrative act), and expressly provides that where merchandise is saved from a wrecked or abandoned vessel, and is promptly brought into the United States by the salvors, in good faith and without intent to evade the just payment of duty, it may be regarded as their property, "and the valuation thereof and payment of duties thereon can be made accordingly and with due reference to the condition of the said merchandise as thus saved and the necessities of the case."

For these reasons, therefore, I am of the opinion that the merchandise in question in the present case may be properly regarded as merchandise taken from a wreck and entitled to entry by appraisement under section 2928.

Very respectfully,

JOHN W. GRIGGS.

The SECRETARY OF THE TREASURY.

PORTO RICO—PUBLIC LANDS—LICENSE.

Under Spanish laws, lands under tide water to high-water mark in the ports and harbors in the Spanish West Indies belonged to the Crown, and as such, by treaty of cession, have become a part of the public domain of the United States.

The power to dispose permanently of the public lands and property in Porto Rico rests in Congress, and in the absence of a statute conferring such power, can not be exercised by the Executive Departments of the Government.

During the military control of Porto Rico leave or license may be granted an individual to make temporary use of portions of the public domain. The grant of a right or privilege to exist in perpetuity, or as long as the conditions of the grant are fulfilled, is beyond the power of the Secretary of War, and ought not be made.

DEPARTMENT OF JUSTICE,

July 26, 1899.

SIR: I am in receipt of your letter of this date inclosing an application from Frederick W. Weeks for permission to construct and maintain a wharf or pier upon which warehouses and superstructures may be erected and the business of carrying on wharfage, storage, and shipping may be conducted at the port of Ponce, in Porto Rico. You ask me to give you my views as to whether there is legal objection to granting such permission.

If constructed, the pier or wharf will be upon the public domain of the United States. I understand that under Spanish law lands under tide water to high-water mark in ports and harbors in the Spanish West Indies belonged to the Crown. As Crown property, they were by the treaty of cession transferred by Spain to the United States of America, and are now a portion of the public domain of that nation. I do not know of any right or power which the Secretary of War or the President has to alienate in perpetuity any of the public domain of the United States, except in accordance with acts of Congress duly passed with reference thereto. There is no legislation by Congress made for or properly applicable to the public domain in Porto Rico. The power to dispose permanently of the public lands and public property in Porto Rico rests in Congress, and in the absence of a statute conferring such power, can not be exercised by the Executive department of the Government. Undoubtedly it will be within your lawful power to make temporary use of the Government domain in Porto Rico during the period of occupancy by the military forces of the United States, and, if it conserves the interests of the Government and its administration of affairs in the island, to grant leave or license to an individual to make temporary use of portions of the public domain; but any privilege of this kind should be limited in its extent to the period of

military occupation, and should not be extended so as to continue as a vested right against the United States when Congress shall have imposed some other form of government upon the island.

As a matter of policy, I would also advise you that no license or privilege of this kind, even of the temporary nature above designated, should be granted except to some person owning the abutting lands from which the proposed pier or wharf is to be projected.

I therefore advise you that the grant of a right or privilege to exist in perpetuity, or as long as the conditions of the grant are fulfilled, is beyond your power, and ought not to be made. Whether a temporary license shall be granted is a matter of administration, to be determined by the War Department upon the principles above pointed out.

Very respectfully.

JOHN W. GRIGGS.

The SECRETARY OF WAR.

PORTO RICO—CONCESSIONS.

In Porto Rico the Crown of Spain was the owner, for public use, of the proprietary rights of the natural beds or channels of rivers, both navigable and unnavigable, to the extent covered by the waters in their ordinary greatest swells.

When public property is ceded by one nation to another its disposition and control are thereafter regulated and governed by the laws of the new owner.

If in the grant of a right or privilege the sovereign has retained any authority which may affect its untrammelled exercise and enjoyment, such right is inchoate and can be exercised only by the grace of the succeeding sovereign.

Any complete and vested right which a person had at the time the treaty of Paris took effect, to the use of the waters of the River Plata, should be respected by the United States.

Neither the President nor the War Department has power to grant a concession of the right to use the water power of the River Plata in Porto Rico.

DEPARTMENT OF JUSTICE,

July 27, 1899.

SIR: I am in receipt of your communication of July 20, 1899, forwarding to me the application of Ramon Valdez y Cobian for a concession of the right to use the water power

of the River Plata, in Porto Rico, together with accompanying papers. You request my opinion as to whether your Department has authority to approve or disapprove of the concession which the applicant seeks and desires to use.

By the papers submitted, it appears that under Spanish law, which prevailed in Porto Rico prior to the going into effect of the treaty of Paris, by which the island was ceded to the United States, the Crown of Spain was the owner, for public use, of the proprietary rights of the natural beds or channels of rivers, both navigable and unnavigable, to the extent covered by the waters in their ordinary greatest swells. The Spanish law of waters applicable to Porto Rico provided in article 218, page 52, as follows:

“In navigable streams, and those which are not navigable, it is within the power of the governor of the province to grant authority for the erection of mills or other industrial establishments, or any buildings situated near the banks to which the necessary water is conducted by canal, this water afterwards being returned to the stream. In no case shall this authority be granted prejudicially, either to the navigation of the stream or to existing industries. To obtain the authority it is an indispensable requisite that whoever solicits it shall be the owner of the ground on which the building is to be erected or shall be thereto authorized by the owner thereof.”

My opinion is based upon the assumption that these statements as to the law of waters that prevailed in Porto Rico prior to the cession of the island are correct. This may fairly be assumed, because the application of Señor Valdez purports to be made in compliance with the provisions of the Spanish law, article 218, above cited.

The River Plata is not a navigable stream. In the brief of counsel for the applicant a distinction is sought to be made between those waters of rivers which belong, by the law of Spain, to the State or Crown and those which belong to the public of Porto Rico. For practical purposes, in the disposition of this case, I can see no difference. Whatever property or property rights belonged to the Crown of Spain or to the indefinite body known as “the public of Porto Rico” were, by the treaty of Paris, transferred to and became the property of the United States of America.

It is well-settled law, and only needs to be stated to be understood, that when public property is ceded by one nation to another its disposition and control are thereafter regulated and governed, not by the laws of the ceding nation, but by the laws of the new owner. If, therefore, any substantial act remains to be done, resting in the grace, favor, or discretion of the Government to secure to an applicant or alleged concessionary a franchise or right in public property thus ceded by one nation to another, such additional action must be obtained in accordance with the laws of the present and not of the former owner. If at the time the treaty of Paris took effect the applicant had a completed and vested right to the use of the waters of the River Plata, that right will be respected by the United States. If, however, his right had not been completed by the action or assent of the Crown authorities of Spain, then his right is not vested but inchoate, and can not be made vested by the completion of those requisites prescribed by Spanish law.

The general rule in respect to vested private rights in cases of change of sovereignty is stated in *Ely's Administrator v. United States* (171 U. S., 220, 223):

"In harmony with the rules of international law, as well as with the terms of the treaties, upon cession the change of sovereignty should work no change in respect to rights and titles; that which was good before should be good after; that which the law enforced before should be enforceable after the cession."

The converse of the latter proposition is undoubtedly true, namely, that which the law before the cession would not enforce will not be enforceable, as a matter of right, after the cession.

Distinctions have been made in all laws passed by Congress for settling legal and equitable titles to lands in Spanish territory ceded to the United States under former treaties, between perfect or complete grants, fully executed, and inchoate incomplete grants, where a right has been sought to be acquired under or by color of local law or authority, but needed some act of the Government to be done to complete it. (*United States v. Arredondo*, 6 Peters, 691, 717. See also *Ainsa v. United States*, 161 U. S., 208, 233; *United States v. Santa Fe*, 165 U. S., 675, 714.)

Those laws of the former government which have for their object a certain governmental public policy, of which character are laws for the disposition of the public domain and the granting of quasi public franchises, rights, and privileges to private individuals or corporations, ceased to have any force or effect after the sovereignty of the former government ceased. (*Harcourt v. Gailliard*, 12 Wheaton, 523.)

If in the granting of a right or privilege the sovereign has retained an iota of authority which may affect its untrammelled exercise and enjoyment, the right is not of the nature of an absolute one, but wholly of an inchoate and imperfect quality. As to inchoate, imperfect, incomplete, and equitable rights, the succeeding sovereign is the absolute dictator. They can not be exercised against his sovereignty, but only by his grace, and his affirmative exercise is necessary to the validity of the concession.

It appears from the papers submitted in the case that the applicant had not obtained authority from the governor of the province for the use of the river Plata which he desires to make. He had only complied with the preliminary requisites (whether all of them or not I am unable to say), which, under Spanish dominion, would have qualified him to apply to the governor of the province for a grant of authority for the erection of the proposed works. Before such authority was granted the power of the Spanish governor and the efficiency of the Spanish laws were terminated, so far as public property in the island is concerned.

The question, therefore, is whether the War Department or the executive department of the Government of the United States, represented by the President, now has power to grant to the applicant the use of this public stream which he desires. In my opinion it has not.

By the Constitution the power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States is vested in Congress. Congress has conferred no authority of this nature upon the Executive, and in the absence of such power conferred by Congress the President can no more dispose of this particular portion of the public property of the United States than he can dispose of the public grounds,

buildings, and other property ceded by Spain to the United States.

In the report made to you by your law officer upon this subject I find it stated that inasmuch as this application was filed October 4, 1898, in accordance with the Spanish law providing for such concessions, if this law was in force in that locality on that date this application, when duly filed, segregates this portion of the Plata River from the public domain, and the effect of the filing of the application, by analogy, is similar to that produced by a homestead entry or preemption right, filed in accordance with law, upon the public domain in the United States. I am unable to agree with this view of the case. The citation from the Spanish law of waters above made indicates clearly that the granting of such a concession, even after all the preliminaries are complied with, is a matter of discretion, resting in the judgment of the governor of the province, who was the royal representative. The article quoted uses this language: "It is within the power of the governor of the province to grant authority, etc. In no case shall this authority be granted prejudicially, either to the navigation of the stream or to existing industries." Clearly the grant of the concession under Spanish law rested in the discretion of the governor, and could not be asserted, upon compliance with preliminaries, as a right.

What I have said is not intended as a decision upon the question as to whether the applicant has or has not any equitable rights which will entitle him hereafter to the favorable action of Congress, either by special or general legislative action. In dealing with inchoate and incomplete claims, especially to land, where the rights of the claimants were not fully vested, but were such as are usually denominated "equitable," it has been the custom of Congress to provide special tribunals of a judicial character to ascertain and determine both the legal and equitable rights of the claimants. So far as I know, the exercise of such powers has never been intrusted to the Executive Departments.

Very respectfully,

JOHN W. GRIGGS.

The SECRETARY OF WAR.

PORTO RICO—TRAMWAYS—CONCESSIONS.

Under Spanish law a tramway is a railroad constructed on a public highway.

A concession for the construction of a certain electric tramway in Porto Rico being inchoate and incomplete and lacking certain public action necessary to be taken by the public authorities representing the Crown of Spain before it could go into effect as a complete grant, the War Department has no authority to grant or complete such concession.

DEPARTMENT OF JUSTICE,

July 28, 1899.

SIR: By letter of June 29, 1899, you transmitted to me certain papers in behalf of Messrs. Vicente and José Usera, of the city of Ponce, Porto Rico, relating to an alleged concession for the construction of a tramway from Ponce to Port Ponce, claimed to have been heretofore lawfully granted to Messrs. Usera, and in connection therewith you request my opinion as to whether, under the evidence submitted, a lawful concession to construct such tramway had been granted to them, and, if so, whether it is proper for your Department to confirm that concession. As the basis of my decision, the following facts are submitted, which I am, for the purposes of this opinion, to assume to be correct:

Prior to November 24, 1896, proceedings were had of such kind and character as to induce the Crown of Spain, then possessing full and complete sovereignty in Porto Rico, to grant, by royal decree, a permit for a franchise or concession for an electric tramway according to plans submitted by Messrs. Vicente and José Usera. This royal grant does not confer the concession upon Messrs. Usera, but simply permits the construction according to the plans submitted by these gentlemen. Under the Spanish law in Porto Rico a tramway is a railroad constructed on public highways. While the entire territory to be traversed by this proposed tramway is within the limits of the municipality of Ponce, yet the proposed tracks will occupy a state highway for a large portion of, if not its entire extent. It is therefore subject to the following provisions of the Spanish law:

“ARTICLE 73. The concession of tramways belongs to the secretary of the colonies when the works are to occupy

the highroads of the state or shall simultaneously traverse highroads of the state and highways of the province and municipalities.

* * * * *

“ARTICLE 76. Tramway concessions can not be granted for more than sixty years, and shall be subject to an auction in regard to the maximum schedule of rates and to the duration of the concession.”

From the “Regulations for the execution of the railroad law of the island of Porto Rico,” promulgated January 27, 1888, the following is quoted:

“ARTICLE 93. The secretary of the colonies, who has the power to grant the concession in the cases specified in article 73 of the law, shall immediately advertise the auction of the works for the period of two months on the basis of the approved plan.

“The auction shall take place in accordance with the provisions of article 76 of said law respecting the schedules of rates, the equality of the propositions as to the duration of the concession, and with the understanding that in all cases the right of legal preference shall be reserved at the auction to the author of the approved plan, and if the latter should not take advantage of the preference the successful bidder shall pay him within one month the value of the plan in accordance with the appraisal made.”

The term “approved plan” as used in the foregoing article means as follows:

The person desiring to secure a concession allowing the construction of a tramway on a State highroad prepares the plans and details comprising the general project and submits the same to the secretary of the colonies. The plans are examined by certain specified officers, engineers, and boards, who report thereon to the secretary of the colonies, who considers their reports and approves or disapproves the plan. Among other reports is one showing the estimated cost of constructing the tramway. If the plan is approved, its price or commercial value is fixed by appraisal; that is, the value of the work performed in preparing said plan is fixed. Thereupon the right to carry out the general project in accordance with said approved plan is sold at auction in accordance with the provisions of article 93, as above quoted. In order to secure

the right to bid at said auction, a deposit of 1 per cent of the estimated cost must be made by the prospective bidder.

From the documents on file herein it clearly appears that the plan prepared and presented by the Messrs. Usera became an "approved plan" for the construction of the proposed tramway, and that said Messrs. Usera made the required deposit of 1 per cent of \$100,000, the estimated cost of construction.

They therefore owned the plan and were qualified to bid at the auction to be held in accordance with article 93 of regulations. It does not appear that said auction was ever had or dispensed with. By royal decree the provincial government in Cuba might exempt the letting of contracts for public works of extraordinary urgency from said requirement, but no such provision is known in regard to tramways in Porto Rico. The Spanish law of railroads in Porto Rico provides a means of securing the right to build a railroad of the kind contemplated herein without a public auction. That method is as follows (regulations of railroad laws):

"ARTICLE 20. In the case to which the preceding articles refer, namely, when it is a question of a petition for a concession without subsidy, and for which only one proposition shall have been presented, said concession shall be granted without the formalities of public auction, but always by means of a law, as provided for in article 27 of the law of railroads.

"To this end the secretary of the colonies shall present to the Cortes the proper form of law, accompanied by all the documents mentioned in article 25 of the law of railroads and in the corresponding articles of these regulations.

"ARTICLE 21. The law to which the preceding article refers being passed, and the bond of 3 per cent of the amount of the estimate being deposited within the time fixed by article 16 of the law of railroads, there shall be issued to the interested party or to the company which may have solicited the concession the proper instrument making the contract a public document, and including in it verbatim the document of general conditions, the special law of concession, the special and economic conditions, and schedule of maximum rates."

No such special act for the benefit of Messrs. Usera as is referred to in article 20, above quoted, was ever passed.

It therefore appears that the concession claimed by the Messrs. Usera is not a complete and vested right or franchise, but is inchoate and incomplete, lacking certain public action necessary to be taken by the public authorities representing the Crown of Spain before it could go into effect as a complete grant or concession of that Government.

In conformity with the views expressed in the opinion of July 26, 1899, relative to the application of Frederick W. Weeks for permission to construct and maintain a wharf at the port of Ponce, and the opinion of July 27, 1899, relative to the application of Señor Valdez for a concession of the right to use the water of the river Plata in Porto Rico, I have the honor to advise you that the Messrs. Usera have not a complete and vested franchise or concession for the construction of a tramway from Ponce to Port Ponce, and that the War Department is without power to exercise the prerogatives of the Government to grant or complete such concession.

Very respectfully,

JOHN W. GRIGGS.

The SECRETARY OF WAR.

CALIFORNIA DÉBRIS COMMISSION—MINING.

The superior court of Sutter County, Cal., granted a temporary injunction on a suit by the county of Sutter, restraining the Red Dog Mining Company, which was operating under a license from the California Débris Commission, from mining by the hydraulic process. *Held*, in the absence of any question touching the validity of the powers granted to the California Débris Commission, the Government should not intervene in the suit.

DEPARTMENT OF JUSTICE,

August 9, 1899.

SIR: Under date of August 1, 1899, you referred to me the indorsement of Gen. John M. Wilson, Chief of Engineers, United States Army, upon a communication from the secretary of the California Débris Commission, dated July 17, 1899, advising the Chief of Engineers that a suit had been commenced in the superior court of Sutter County by the county of Sutter, State of California, to restrain the Red

Dog Mining Company from mining by the hydraulic process, and that the court had issued a temporary injunction to stop the operation of their mine, and calling the attention of the Chief of Engineers to the matter for such action as he might deem proper.

General Wilson, by his indorsement, states that the license was duly issued by the Débris Commission to the Red Dog Mining Company, pursuant to the provisions of the act of March 1, 1893, entitled "An act to create the California Débris Commission and regulate hydraulic mining in the State of California."

The question suggested by General Wilson's memorandum is whether there is any duty or obligation resting on the commission to take any action in a case of this kind. He states that a number of cases of this nature are likely to arise, and that it would be advisable to have the opinion of the Attorney-General on the question, and it is in pursuance of his recommendation that the matter is referred to me.

An examination of the act of March 1, 1893, discloses the fact that the object of the creation of the Débris Commission was the regulation of hydraulic mining in California, so as to prevent injury to the navigability of streams as to which the United States has jurisdiction. Under its provisions, upon compliance with certain terms and conditions, permits or licenses are granted to applicants to work mines by the hydraulic process.

The scope of the act appears to be limited merely to providing means by which hydraulic mining may be regulated so as not to injuriously interfere with public rights of navigation in streams or waters as to which the Federal Government has jurisdiction. It does not appear that any right or privilege is intended to be granted which will bind any party except the United States. I fail to see, therefore, in what manner or upon what consideration the Débris Commission or the War Department is either interested or bound to intervene and defend the rights of the mining company whose operations are sought to be restrained by the suit brought against them by the county of Sutter.

The grounds upon which the injunction is sought are not stated in any of the papers submitted to me, nor does it

appear that the validity of the license or permit granted by the Débris Commission is in anywise brought in question. It may be possible that in the progress of this suit, or others of a kindred nature, the validity of the powers granted to the Débris Commission by the act of 1893 may in some manner be brought in question. If such question should thus be raised, it would then be a matter for consideration whether the Department of Justice, in the interest of the Government, should not intervene in order to sustain the validity of the acts done by the agent of the Government under the powers delegated by the act in question. But no such necessity at present appears, and I, therefore, advise you that the Red Dog Mining Company and the Débris Commission should be advised that it is not deemed expedient for the commission or any Department of the Government to intervene in the suit.

Very respectfully,

JOHN W. GRIGGS.

The SECRETARY OF WAR.

CIVIL SERVICE—TEMPORARY APPOINTMENTS.

An appointment by the Secretary of State, without reference to or conformity with the regulations prescribed for appointments in the classified service, made pursuant to the act of July 1, 1898, authorizing the temporary employment of stenographers and typewriters in his Department, is lawful.

The amendment of the civil-service rules of May 29, 1899, authorizing the permanent employment of persons serving under temporary appointments, was intended to apply only to such persons as were serving under temporary appointments pursuant to Rule 8 of the civil-service rules, and such amendment does not comprehend temporary appointments made under the act of July 1, 1898.

General words may be restrained so as to apply only to the subject within the purview of the act, though literally they would embrace a much larger class.

All parts of an act relating to the same subject should be considered together and not each by itself.

DEPARTMENT OF JUSTICE,

August 10, 1899.

SIR: The sundry civil act, approved July 1, 1898, under the heading of appropriations for the State Department, contained the following:

“Office of the Secretary: For temporary typewriters and

stenographers in the Department of State, to be selected by the Secretary, two thousand dollars, to be immediately available."

On July 28, 1898, your predecessor, Secretary Day, appointed Caroline C. Galbreath to one of the positions provided for by the above-quoted appropriation. No notice of this appointment was given to the Civil Service Commission, nor was it in any way authorized by that body. Recently, and since the promulgation of the amendments to the civil-service rules of May 29, 1899, Mrs. Galbreath was appointed by you to a permanent position in the classified service as stenographer in the Department of State, upon the assumption that you were authorized to make such appointment by virtue of the recent amendment to the civil-service rules comprised in paragraph 15 of Rule 8, which reads as follows:

"All persons serving under temporary appointments at the date of the approval of this section may be permanently appointed, in the discretion of the proper appointing officer; and the special rule approved January 20, 1899, relative to temporary appointments in the Navy Department is hereby rescinded."

Mrs. Galbreath was not in the classified service, and neither her temporary nor her permanent appointment was made in conformity with the provisions of the civil-service rules relative to appointment of persons in the classified service.

You request my opinion, first, whether the appointment of Mrs. Galbreath as a temporary clerk by your predecessor was according to law, and secondly, whether her transfer to the permanent service by your order was legal.

I think the original appointment of Mrs. Galbreath as a temporary clerk in the Department of State, without reference to or conformity with the proceedings directed to be complied with where appointments are made to positions in the classified service, was lawful. The language of the appropriation act above quoted indicates that the object of Congress was to provide for extraordinary and unusual services which were only temporarily required. The appropriation designates no number of stenographers and typewriters which the Secretary may employ, leaving it to his discretion to employ one or two if the exigencies of the

service and the necessity of speedy action required, or a much larger number if in the judgment of the Secretary a larger number would better facilitate the work. The only limit on the discretion of the Secretary is the amount of the expenditure for this purpose, which is fixed at \$2,000. The appropriation clause does not create offices or positions, but merely provides for temporary employment. In such cases it is quite reasonable to suppose that Congress intended that the Secretary should be unimpeded in his speedy selection of his force by any of the ordinary delays which occur in complying with the civil-service rules where positions in the classified service are to be filled upon certification of names from the eligible list. As an evidence that Congress so intended, they directed that the stenographers and typewriters should be selected by the Secretary. The power of selection implies full power and discretion in the Secretary to select from any source. I can not agree with the contention of the Civil Service Commissioners that the word "selected" as used in this appropriation has only the same force and effect as if the word "appointed" had been used. The mere right to select one of three persons certified to him by the Civil Service Commission from a specific list of eligibles is not a power of selection, free and untrammelled, within the meaning of this act, and I think, therefore, that the Secretary in choosing for this work a person outside of the eligible list, without reference to the civil-service rules, was acting within his power and within the obvious intention of Congress.

I am of the opinion, however, that the appointment of Mrs. Galbreath to the permanent service by your recent order was unauthorized. The decision of your second question depends upon the construction to be given to the language of paragraph 15 of rule 8 of the civil-service rules, which, as has been stated, was an amendment or supplement to these rules, added by the order of the President May 29, 1899. The language of paragraph 15 of rule 8 is general. It says: "All persons serving under temporary appointments at the date of the approval of this section may be permanently appointed, in the discretion of the proper appointing officer." But language in a statute, or in rules and regula-

tions made pursuant to law, is not necessarily to be construed literally, but with reference to the subject-matter of the rule or enactment. It is an elementary rule of construction that general words may be restrained so as to apply only to the subject within the purview of the act, though literally they would embrace a much larger class. It was said in the case of *Atkins v. Disintegrating Co.* (18 Wall., 301):

"A thing may be within the letter of a statute and not within its meaning. In cases admitting of doubt the intention of the lawmaker is to be sought in the entire context of the section, statutes, or series of statutes *in pari materia*.

"The general language found in one place may be restricted in its effect to the particular expressions employed in another."

It is also an elementary rule of construction that all the parts of an act relating to the same subject should be considered together and not each by itself.

Applying these elementary principles of construction to the question in hand, we are able to determine from an examination of the civil-service rules what meaning ought to be given to the clause of paragraph 15 of rule 8, "All persons serving under temporary appointments." We find that paragraph 13 of rule 8, which was in existence prior to the adoption of paragraph 15, specially regulates the subject of temporary appointments. It provides:

"Whenever there are no names of eligibles upon a register for any grade in which a vacancy exists, and the public interest requires that it must be filled before eligibles can be provided by the Commission, such vacancy may, subject to the approval of the Commission, be filled by appointment without examination and certification for such part of three months as will enable the Commission to provide eligibles. Such temporary appointment shall expire by limitation as soon as an eligible shall be provided, and no person shall serve longer than three months in any one year under such temporary appointment or appointments, unless by special authority of the Commission previously obtained. Said year limitation shall commence from the date of such first appointment."

Paragraph 14 of rule 8 further provides that such temporary appointments shall in no case continue longer than six months, and shall expire by limitation at the end of that period.

I think, therefore, that when the President in formulating and adopting paragraph 15 spoke of persons serving under temporary appointments he meant to include only such persons as were serving under temporary appointments within the meaning and purview of the preceding provisions of rule 8, and that he did not refer to persons who might be performing temporary service under such enactments as that of July 1, 1898, under which Mrs. Galbreath was appointed to temporary service. It seems to be entirely clear and perfectly rational to hold that when a code of law or regulations provides, as in this instance, for the creation of a particular class of appointments and designates them by a particular phrase, as the civil-service rules designated these "temporary appointments," any subsequent supplement or amendment to such code or regulations in which the same term is employed should be given the same import and significance, unless there be something in the language of the supplement or amendment requiring a different sense, either an enlarged or a contracted one, to be attributed to the phrase. There is nothing in the language of paragraph 15 that tends to show that the temporary appointments there spoken of were any other than those referred to in the two paragraphs immediately preceding.

Very respectfully,

JOHN W. GRIGGS.

The SECRETARY OF STATE.

PORTO RICO—DUTIES.

In territory held by conquest, the military authorities in possession, in the absence of legislation by Congress, may make such rules or regulations and impose such duties upon merchandise imported into the conquered territory as they may deem wise and prudent.

The admission of merchandise into the ports of the United States from such conquered territory is governed solely by existing laws passed by Congress, and the President has no power to add to or detract from the force and effect of such laws.

Merchandise from the island of Porto Rico introduced into the ports of the United States is by law required to pay the same duties that would be charged upon merchandise imported from a foreign country, and the President has no authority to alter or modify the laws under which such duties are required to be paid.

DEPARTMENT OF JUSTICE,

August 10, 1899.

SIR: I have the honor to acknowledge the receipt of your letter of August 3, 1899, wherein you request my opinion upon the question whether the President, without further legislation by Congress, has now authority to permit the introduction of merchandise from the island of Porto Rico into the ports of the United States without payment of the customs duties which would be payable thereon if the same merchandise were imported from a foreign country.

The island of Porto Rico was ceded to the United States by Spain by a treaty of peace signed at Paris December 10, 1898, and ratified by the Senate February 6, 1899. At the time of the signing of the treaty Porto Rico was in possession of the military forces of the United States, who were administering the government of the island as a conquered territory under the law of belligerent right. In contradistinction to the treaties by which Louisiana, Florida, California, and Alaska were ceded to the United States, the treaty of Paris contains no provision conferring upon the inhabitants of the ceded territory the privileges and immunities of citizens of the United States, but merely provides that the civil rights and political status of the native inhabitants shall be determined by Congress.

The right of the President as Commander in Chief of the Army and Navy of the United States under the Constitution to exercise government and control over Porto Rico did not cease or become defunct in consequence of the signature of the treaty of peace, nor from its ratification. It was settled by the judgment of the Supreme Court of the United States in a similar case arising out of the enforcement of local tariff laws in California subsequently to the cession of that territory and prior to any legislation with reference to it by Congress, that the civil government organized from a right of conquest by the military officers of the United

States was continued over it as a ceded conquest without any violation of the Constitution or laws of the United States. (*Cross v. Harrison*, 16 Howard, 164.) According to the well-settled principles of public law relating to territory held by conquest, and according to the adjudication of the Supreme Court of the United States in *Cross v. Harrison*, the military authorities in possession, in the absence of legislation by Congress, may make such rules or regulations and impose such duties upon merchandise imported into the conquered territory as they may, in their judgment and discretion, deem wise and prudent. But as to the admission of merchandise into the ports of the United States, that is governed solely by the existing laws passed by Congress, and the President is powerless either to add to or detract from the force and effect of such laws. If the laws require that merchandise introduced from the island of Porto Rico into the ports of the United States should pay the same duties that would be charged upon similar merchandise imported from those countries which are distinctly foreign, then the President is powerless to remit such obligation. The question, therefore, to be decided, relates not to the power of the President in the matter, but to the law of the United States governing the introduction of merchandise at their domestic ports. Its solution depends upon whether Porto Rico is to be considered, as to the customs laws of the United States, domestic or foreign territory. The facts of the case are, fortunately, not without parallel, and the question has practically been authoritatively disposed of by the judgment of the Supreme Court of the United States. The authority to which I refer is *Fleming v. Page*, 9 Howard, 603. This case was decided in 1850, the opinion of the court being rendered by Chief Justice Taney. The case involved the legality of the exaction of duties at the port of Philadelphia on merchandise imported into that port from Tampico, Mexico, in March and June of 1847, when Tampico was in the military possession of the United States as conquered territory. "By the laws and usages of nations," said the Chief Justice, "conquest is a valid title while the victor maintains the exclusive possession of the conquered country. The citizens of no other nation, therefore, had a

right to enter it without the permission of the American authorities, nor to hold intercourse with its inhabitants, nor to trade with them. As regarded all other nations, it was a part of the United States, and belonged to them as exclusively as the territory included in our established boundaries. But yet it was not a part of this Union. And the relation in which the port of Tampico stood to the United States while it was occupied by their arms did not depend upon the laws of nations, but upon our own Constitution and acts of Congress."

The Chief Justice further points out the fact that there was no act of Congress establishing a custom-house at Tampico nor authorizing the appointment of a collector; and consequently there was no officer of the United States authorized by law to grant the clearance and authenticate the coasting manifest of the cargo in the manner directed by law where the voyage is from one port of the United States to another. The person who acted in the character of collector acted as such under the authority of the military commander and in obedience to his orders; and the duties he exacted and the regulations he adopted were not those prescribed by law, but by the President in his character of Commander in Chief. The permit and coasting manifest granted by an officer thus appointed, and thus controlled by military authority, could not be recognized in any port of the United States as the document required by the act of Congress when the vessel is engaged in the coasting trade, nor could they exempt the cargo from the payment of duties.

The Chief Justice then refers to the uniform construction of the revenue laws given by the Executive Departments of the Government in all similar cases that had previously arisen, and concludes as follows:

"This construction of the revenue laws has been uniformly given by the administrative department of the Government in every case that has come before it. And it has, indeed, been given in cases where there appears to have been stronger ground for regarding the place of shipment as a domestic port. For after Florida had been ceded to the United States, and the forces of the United States had taken possession of Pensacola, it was decided by the Treasury

Department that goods imported from Pensacola before an act of Congress was passed erecting it into a collection district, and authorizing the appointment of a collector, were liable to duty. That is, that although Florida had, by cession, actually become a part of the United States, and was in our possession, yet, under our revenue laws, its ports must be regarded as foreign until they were established as domestic by act of Congress; and it appears that this decision was sanctioned at the time by the Attorney-General of the United States, the law officer of the Government. And although not so directly applicable to the case before us, yet the decisions of the Treasury Department in relation to Amelia Island and certain ports in Louisiana, after that province had been ceded to the United States, were both made upon the same grounds. And in the latter case, after a custom-house had been established by law at New Orleans, the collector at that place was instructed to regard as foreign ports Baton Rouge and other settlements still in possession of Spain, whether on the Mississippi, Iberville, or the seacoast. The Department in no instance that we are aware of, since the establishment of the Government, has ever recognized a place in a newly acquired country as a domestic port, from which the coasting trade might be carried on, unless it had been previously made so by act of Congress.

“The principle thus adopted and acted upon by the executive department of the Government has been sanctioned by the decisions in this court and the circuit courts whenever the question came before them. We do not propose to comment upon the different cases cited in the argument. It is sufficient to say that there is no discrepancy between them. And all of them, so far as they apply, maintain that, under our revenue laws, every port is regarded as a foreign one unless the custom-house from which the vessel clears is within a collection district established by act of Congress, and the officers granting the clearance exercise their functions under the authority and control of the laws of the United States.”

The authority of this decision, so far as I know, has never been expressly questioned. It appears from the statements

of the Chief Justice that this view of the law had guided the Executive Departments in dealing with the same question in the administration of the ceded territories of Louisiana and Florida.

There are certain expressions in the opinion of Mr. Justice Wayne in the case of *Cross v. Harrison* (16 Howard, 164) which would appear to be in conflict with the views expressed by the Chief Justice in the case of *Fleming v. Page*. But these expressions are in the nature of *obiter dicta*, and although *Cross v. Harrison* was decided in 1853, the opinion of Mr. Justice Wayne makes no reference whatever to the decision of *Fleming v. Page*. If he had intended in any wise to overrule the decision established by *Fleming v. Page*, it is inconceivable that he would not have referred to it expressly and have given some discussion of the reasons why a judgment in which he concurred three years previously was thus to be set aside. The point decided in *Cross v. Harrison* was that the formation of a civil government in California was the lawful exercise of a belligerent right over a conquered territory; that this government did not cease as a consequence of the restoration of peace, and was rightfully continued until Congress legislated otherwise; and that the tonnage duties and duties upon foreign goods imported into San Francisco were legally demanded and lawfully collected by the civil government whilst the war continued, and afterwards from the ratification of the treaty of peace until the revenue system of the United States was put into practical operation in California under the acts of Congress passed for that purpose. The decision harmonizes with the principles laid down by Chief Justice Taney in *Fleming v. Page*, the only apparent divergence arising from the dicta of Mr. Justice Wayne above referred to.

The practice that prevailed with reference to Louisiana and Florida has been followed by the executive department of the Government thus far in relation to all the recently acquired territory of the United States in the West Indies and the Pacific Ocean. The resolution of Congress of July 7, 1898, providing for the annexation of the Hawaiian Islands expressly declared that the existing customs relations of these islands with the United States and other countries should remain

unchanged until legislation should be enacted extending the United States customs laws and regulations to them. This was only declaratory of what would have been without expression the proper construction of the resolution, so far as the tariff laws of this country are concerned. And the failure of Congress to extend by express enactment the customs laws of the United States to Porto Rico and the other islands ceded by Spain after the ratification of the treaty of Paris, in view of the fact that the executive department was following the precedents above cited, and requiring the payment of our tariff rates on merchandise imported from those places, may fairly be taken as indicative of the opinion of Congress that it desired for the present to have that practice continued.

I therefore advise you that, in my opinion, merchandise from the island of Puerto Rico introduced into the ports of the United States is, by law, required to pay the same duties that would be charged upon merchandise imported from a foreign country, and that the President has no power to alter or modify the laws under which such duties are required to be paid.

Very respectfully,

JOHN W. GRIGGS.

The SECRETARY OF WAR.

AMERICAN REGISTRY.

The *Scipio*, a foreign-built steamship purchased by the Navy Department for use in the war with Spain, and subsequently sold to and owned by an American citizen, is not entitled to registry under the laws of the United States.

The regulation of commerce and navigation being entirely within the control of Congress, there is no authority for an Executive Department to make or enforce rules or regulations relative to the registry of vessels or kindred matters connected with such subjects.

DEPARTMENT OF JUSTICE,

August 11, 1899.

SIR: I have the honor to acknowledge the receipt of your communication of this date, in which you request my opinion as to whether the *Scipio*, a foreign-built steamship purchased by the Navy Department for its use in the recent war with Spain, and subsequently sold to and now owned by an Amer-

ican citizen, is entitled to registry under the laws of the United States relative to the registry of vessels.

The regulation of commerce and navigation is a subject entirely within the control of Congress, and, except in accordance with such laws as have been passed by Congress upon this subject, no authority exists in the Executive Departments to make or enforce rules or regulations relative to the registry of vessels or kindred matters connected with commerce and navigation. Congress has specifically legislated upon the subject of the registry of vessels. Section 4132 of the Revised Statutes describes the vessels that are entitled to be registered in conformity to the directions of the subsequent sections of the same title. That section reads as follows:

“Vessels built within the United States, and belonging wholly to citizens thereof, and vessels which may be captured in war by citizens of the United States and lawfully condemned as prize, or which may be adjudged to be forfeited for a breach of the laws of the United States, being wholly owned by citizens, and no others, may be registered as directed in this title.”

This is a positive and specific direction as to what vessels may be and what may not be registered. Doubtless it would be advantageous to permit vessels of the character of the *Scipio* to be admitted to the rights of local registry equally with vessels condemned as lawful prize and sold as such under the authority of the Government. But Congress has provided for the registry of vessels of the latter class and has forbidden the registry of vessels of the former class. It is unusual to find in a public statute a provision whose terms are as clear and explicit as are the provisions of section 4132.

The Commissioner of Navigation, in his letter to you of August 10, transmitted with your request, discusses fully and, in my judgment, correctly the legal considerations connected with a construction of the law. I have to advise you, therefore, that, under the facts stated to me, the *Scipio* is not entitled to registry.

Very respectfully,

JOHN W. GRIGGS.

The SECRETARY OF THE TREASURY.

REDEMPTION OF WAR-REVENUE STAMPS.

The Commissioner of Internal Revenue has authority, with the approval of the Secretary of the Treasury, to make regulations looking to the redemption of unused documentary stamps issued under the act of June 13, 1898.

In the absence of such rules, the Commissioner of Internal Revenue may cause such unused stamps to be redeemed.

A regulation made in pursuance of an act of Congress has the force of law.

DEPARTMENT OF JUSTICE,

August 19, 1899.

SIR: I have the honor to acknowledge receipt of yours of the 17th of April, 1899, relative to the power of the Commissioner of Internal Revenue to redeem or exchange under certain circumstances documentary stamps issued under the provisions of the act of June 13, 1898, known as the war-revenue act. You ask this question:

“Whether the last proviso of section 17 of the act of March 1, 1879 (20 Stat., 327), which provides that from and after June 30, 1879, no allowance shall be made in any manner for documentary stamps other than for those of the denomination of 2 cents, is still in force.”

The case pending before the Commissioner of Internal Revenue for decision is based upon the following facts:

Maitland, Coppel & Co., of New York, purchased from the collector of internal revenue 31 adhesive documentary stamps of the denomination of \$1,000 respectively. At the time of the purchase of these stamps the purchasers were under the belief that \$31,000 worth of stamps were required upon a certain instrument which it was their duty to stamp. After the purchase, however, it was ascertained that \$30,000 was the correct amount of stamps required on that instrument, and thus one of the stamps of the denomination of \$1,000 was left in their hands unused. They have applied to the Commissioner for the redemption of this \$1,000 stamp.

Section 31 of the act of June 13, 1898, reads as follows:

“That all administrative, special, or stamp provisions of law, including the laws in relation to the assessment of taxes not heretofore specifically repealed, are hereby made applicable to this act.”

The question, therefore, first presented is as to whether this provision of the war-revenue act makes applicable to the administration and enforcement of said act the proviso of section 17 of the act of March 1, 1879, above referred to.

It will be observed that the power vested in the Commissioner of Internal Revenue to redeem stamps issued under the laws in existence previous to the act of June 13, 1898, is derived from section 3426 of the Revised Statutes, in which this language will be found:

"The Commissioner of Internal Revenue may, upon the receipt of satisfactory evidence of the facts, make an allowance for or redeem such of the stamps issued under the provisions of this title, or of any internal-revenue act, as may have been spoiled, destroyed, or rendered useless," etc.

The authority to redeem documentary stamps was, by the act of July 12, 1876 (19 Stat., 88), confined to those of the denomination of 2 cents; and by the act of March 1, 1879 (20 Stat., 327), both of which latter acts were amendments to the original act, claims for allowance on account of stamps were required to be presented within three years, existing claims for the redemption of stamps other than 2-cent documentary stamps were required to be presented within one year, and after June 30, 1879, no allowance could be made in any manner for documentary stamps other than those of the denomination of 2 cents.

It will be seen that all of these acts refer to documentary stamps issued under the provisions of Title XXXV of the Revised Statutes, and the legislation subsequent to the act first authorizing the redemption of such stamps resulted from the fact that documentary stamps issued under the provisions of the said title gradually went out of use until those of the denomination of 2 cents alone were required at the time the amendatory acts were passed.

The question is then directly presented as to how far, if at all, such legislation, pertaining to a system of laws with reference to the issue and use of internal-revenue stamps provided for by said system, can affect a subsequent and independent act providing for the issue and use of internal-revenue stamps differing in many instances materially from those issued under the former legislation.

It will be ascertained, in following up the legislation relative to the use of documentary stamps, that the act of June 6, 1872 (sec. 36, 17 Stat., 256), provided for the repeal on and after October 31, 1872, of stamp taxes on instruments, except the stamp tax on bank checks, drafts, and orders, and that the law requiring the use of the 2-cent stamps was repealed by the act of March 3, 1883 (22 Stat., 488). Therefore, the laws under which the documentary stamps provided for by previous legislation were issued having been repealed, all the acts of Congress pertaining solely to the redemption of such stamps have become obsolete; and I therefore, in answer to the question as to whether the last proviso of section 17 of the act of March 1, 1879 (20 Stat., 327), is still in force, advise you that it is not; nor is any of the legislation providing for the redemption of documentary stamps under Title XXXV of the Revised Statutes in force. Consequently said proviso can in no way enter into the administration of the war-revenue act.

The only question, therefore, which remains to be considered is whether the Commissioner of Internal Revenue is authorized under any circumstances to redeem documentary stamps issued under the provisions of the last-named act.

Section 321 of the Revised Statutes, in defining the duties of the Commissioner of Internal Revenue, says:

"The Commissioner of Internal Revenue, under the direction of the Secretary of the Treasury, shall have general superintendence of the assessment and collection of all duties and taxes now or hereafter imposed by any law providing internal revenue; and shall prepare and distribute all the instructions, regulations, directions, forms, blanks, stamps, and other matters pertaining to the assessment and collection of internal revenue."

By this law the Commissioner of Internal Revenue, under the direction of the Secretary of the Treasury, has the general management, supervision, and control of the assessment and collection of internal-revenue taxes. He has authority to give instructions and to make *regulations* such as may be necessary to carry out the general purposes of

the law. It will be seen, therefore, that the general powers of the Commissioner pertaining to the assessment and collection of internal-revenue taxes are exceedingly broad and comprehensive. In addition to the powers thus granted under the general law, section 25 of the act of June 13, 1898, is as follows:

“That the Commissioner of Internal Revenue shall cause to be prepared for the payment of the taxes prescribed in this act suitable stamps denoting the tax on the document, article, or thing to which the same may be affixed, and he is authorized to prescribe such method for the cancellation of said stamps, as substitute for or in addition to the method provided in this act, as he may deem expedient. The Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, is authorized to procure any of the stamps provided for in this act by contract whenever such stamps can not be speedily prepared by the Bureau of Engraving and Printing; but this authority shall expire on the first day of July, eighteen hundred and ninety-nine. That the adhesive stamps used in the payment of the tax levied in Schedules A and B of this act shall be furnished for sale by the several collectors of internal revenue, who shall sell and deliver them at their face value to all persons applying for the same, except officers or employees of the Internal-Revenue Service: *Provided*, That such collectors may sell and deliver such stamps in quantities of not less than one hundred dollars of face value, with a discount of one per centum, except as otherwise provided in this act. And he may, with the approval of the Secretary of the Treasury, make all needful rules and regulations for the proper enforcement of this act.”

The last clause of the section quoted confers upon the Commissioner, with the approval of the Secretary of the Treasury, the power to make all needful rules and regulations for the proper enforcement of the act. He is not only authorized to make regulations for the enforcement of the act, but such regulations as are needful for its *proper* enforcement, his authority in this respect being restrained only by the failure of the Secretary to approve such regulations as he may make.

It is a well-settled principle that a regulation made in pursuance of an act of Congress has the force of law. (*United States v. Eliason*, 16 Pet., 291; *Ex parte Reed*, 100 U. S., 13; *United States v. Barrows et al.*, 10 Int. Rev. Rec., 86; *Harvey v. United States*, 3 Ct. Clms., 38.) I think it may well be held as proper in carrying out the purposes of the act of June 13, 1898, that the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, has authority in his discretion to cause an unused documentary stamp in the hands of a purchaser to be redeemed. It is true that the act does not in express terms vest the Commissioner with this power, yet the great discretion which is given to him to make such rules and regulations as are needful for the proper enforcement of the act, in my opinion, includes every power which is necessary, not only to collect the taxes levied under the provisions of the act, but to so administer it as to deal justly with the citizen and taxpayer.

The war-revenue act, as is well known, was passed to meet an emergency. A war with a foreign nation made the raising of additional revenue for the Government's use a necessity. The act, though apparently hurriedly, and in some respects I may say unskillfully, drafted, still in my opinion is sufficiently explicit to indicate the purpose of the lawmakers, not only to secure the collection of the taxes provided for by it, but also to protect the taxpayer from any unequal or unjust enforcement of its provisions.

There is another view which I think can be safely taken, which is founded on a portion of section 3426, Revised Statutes, which does not seem to be affected by the repeal of the laws relating to documentary stamps issued under Title XXXV of the Revised Statutes, and that is the provision in said section extending the authority of the Commissioner of Internal Revenue to make allowance for the redemption of stamps issued under *any internal-revenue act*. If that portion of section 3426 which is rendered inoperative by reason of the acts repealing the laws authorizing the issue of documentary stamps under the provisions of said title is

eliminated, there still remains enough of said section to read as follows:

"The Commissioner of Internal Revenue may, upon receipt of satisfactory evidence of the facts, make allowance for or redeem such of the stamps issued under the provisions * * * of *any internal-revenue act* as may have been spoiled, destroyed, or rendered useless or unfit for the purpose intended, or for which the owner may have no use, or which, through mistake, may have been improperly or unnecessarily used, or where the rates or duties represented thereby have been excessive in amount, paid in error, or in any manner wrongfully collected; and such allowance or redemption shall be made either by giving other stamps in lieu of the stamps so allowed for or redeemed, or by refunding the amount or value to the owner thereof, deducting therefrom, in case of repayment, the percentage, if any, allowed to the purchaser thereof; but no allowance or redemption shall be made in any case until the stamps so spoiled or rendered useless shall have been returned to the Commissioner of Internal Revenue, or until satisfactory proof has been made showing the reason why the same can not be so returned." * * *

Consequently, although all laws for the redemption of documentary stamps issued under the provisions of Title XXXV are obsolete, because the authority to issue such stamps is repealed, the power yet remains to redeem documentary stamps issued under another, though a subsequent, internal-revenue act. The act of June 13, 1898, is an internal-revenue act, and among the methods of raising revenue thereby is that providing for the use of documentary stamps. If, therefore, so much of section 3426 as I quote above is still the law, it becomes a part of the said act by virtue of section 31 of the same.

I deem it, therefore, entirely consistent with the terms of the act of June 13, 1898, considered in connection with powers conferred by previous legislation, to give it as my opinion that the Commissioner of Internal Revenue has authority, with the approval of the Secretary of the Treasury, to make suitable regulations looking to the redemption

of unused documentary stamps issued under the provisions of said act, and in the absence of such regulations I advise you that, with the sanction of the Secretary of the Treasury, the Commissioner of Internal Revenue may, in any particular case, cause such unused stamp or stamps to be redeemed.

Respectfully,

JAS. E. BOYD,
Acting Attorney-General.

The SECRETARY OF THE TREASURY.

HAWAII—PUBLIC LANDS.

The laws of a government which have for their object a certain governmental policy, such as those for the disposition of the public domain and the granting of quasi public franchises, rights, and privileges to private individuals or corporations, cease to have any force or effect after the sovereignty of such government ceases.

By the resolution of annexation the local government of Hawaii was deprived of all authority to dispose of public lands in any manner whatsoever, except by virtue of special laws enacted by Congress.

The officers of the Hawaiian government have no authority to sell or otherwise dispose of the public lands in the Hawaiian Islands, and any such sales or agreements to sell are absolutely null and void as against the Government of the United States.

DEPARTMENT OF JUSTICE,
September 9, 1899.

SIR: I have the honor to acknowledge receipt by reference from you of a communication addressed to you by the Acting Secretary of the Interior, dated August 24, 1899, calling attention to the fact that the local government of the Hawaiian Islands are about to dispose at public auction of portions of the public lands of Hawaii, and suggesting that in view of the provisions of the resolution of annexation, approved July 7, 1898, such action on the part of the Hawaiian authorities is without legal warrant or authority, and that the matter be submitted to the Attorney-General with a view to an expression of his opinion upon the question, to the end that the existing government of the Hawaiian Islands may be advised as to their power and duty in the premises. The letter of the Acting Secretary is accompanied by several letters in the nature of protests against the contemplated action of the Hawaiian authorities and a copy of the pro-

posed conditions of sale of the lands referred to. An inspection of the conditions of sale indicates that a very large quantity of land, in 50-acre lots, was to be disposed of on Saturday, September 2, 1899, at the Hilo court-house, and that it is the understanding of the authorities that they can convey to such purchasers a good and valid title to any and all lands that may be sold in accordance with the advertised conditions.

I have given attentive consideration to the question raised by these papers, and have no hesitation in advising you that the officers of the existing government in said islands have no authority to sell or otherwise dispose of the public lands in the Hawaiian Islands, and that any such sales or agreements to sell will be absolutely null and void as against the Government of the United States.

It is only necessary to refer to the language of the resolution and to the well-understood principles of public law which govern the subject of territory ceded by one government to another, to reach the easy conclusion that the public lands in the Hawaiian Islands, upon the approval of the joint resolution of cession, became the property of the United States, and could thereafter be disposed of only in accordance with such special laws as Congress might thereafter enact. The preamble of the resolution declares:

“Whereas the Government of the Republic of Hawaii having in due form signified its consent, in the manner provided by its constitution, to cede absolutely and without reserve to the United States of America all rights of sovereignty of whatsoever kind in and over the Hawaiian Islands and their dependencies, and also to cede and transfer to the United States the absolute fee and ownership of all public, Government, or crown lands, public buildings or edifices, ports, harbors, military equipment, and all other public property of every kind and description belonging to the Government of the Hawaiian Islands, together with every right and appurtenance thereunto appertaining.”

And the resolution following this preamble resolves:

“That said cession is accepted, ratified, and confirmed, and that the said Hawaiian Islands and their dependencies be, and they are hereby, annexed as a part of the territory

of the United States and are subject to the sovereign dominion thereof, and that all and singular the property and rights hereinbefore mentioned are vested in the United States of America."

This language expressly recites the cession and transfer to the United States of the absolute fee and ownership of all public, government, or crown lands, and all other public property of every kind and description belonging to the government of the Hawaiian Islands.

The resolution of annexation further provides:

"The existing laws of the United States relative to public lands shall not apply to such lands in the Hawaiian Islands; but the Congress of the United States shall enact special laws for their management and disposition: *Provided*, That all revenue from or proceeds of the same, except as regards such part thereof as may be used or occupied for the civil, military, or naval purposes of the United States, or may be assigned for the use of the local government, shall be used solely for the benefit of the inhabitants of the Hawaiian Islands for educational and other public purposes."

The effect of this clause is to subject the public lands in Hawaii to a special trust, limiting the revenue from or proceeds of the same to the uses of the inhabitants of the Hawaiian Islands for educational or other public purposes. This merely restricted the uses to which the proceeds of such lands could be put, but did not in anywise affect the previous provisions of this clause, which conferred upon Congress the sole and absolute authority to provide for the management and disposition of these lands. The effect of the language quoted is to vest in Congress the exclusive right, by special enactment, to provide for the disposition of public lands in Hawaii. Possibly such would have been the effect of the resolution even if this language had not been inserted. But the language having been expressly inserted, there can be no doubt whatever but what the effect of the resolution is to deprive the local government of Hawaii of all authority to dispose of these lands in any manner whatever, except by virtue of special laws enacted by Congress. The fact that Congress has failed up to this time to legislate on the subject has not reinvested the

Hawaiian government with its former power of disposition. That power ceased upon the cession. The lands then became the property of the United States, and could be disposed of only in accordance with the laws of Congress. Until Congress passes laws in conformity to the provisions of the resolution providing for the sale or disposition of these lands they must remain undisposed of. That clause of the resolution of annexation which directs that "Until Congress shall provide for the government of such islands all the civil, judicial, and military powers exercised by the officers of the existing government in said islands shall be vested in such person or persons and shall be exercised in such manner as the President of the United States shall direct," does not refer to or affect this subject. It relates only to the ordinary internal administration of civil, judicial, and military affairs, and does not cover in any degree or in any aspect the disposition of public lands, which is elsewhere provided for in the resolution.

The general principle of public law which governs and controls this subject is concisely stated in the case of *Harcourt v. Gailliard* (12 Wheaton, 523):

"Those laws of the former government which have for their object a certain governmental public policy, of which character are laws for the disposition of the public domain and the granting of quasi public franchises, rights and privileges to private individuals or corporations, ceased to have any force or effect after the sovereignty of the former government ceased."

I have the honor to advise you that the local head of the existing government in Hawaii should be notified that such government has no power to make any sale or disposition of the public lands in the islands; that all proceedings taken or pending for such sale or disposition should be discontinued, and that if any sales or agreements for sale have been made since the adoption of the resolution of annexation, the purchasers should be notified that the same are null and void, and any consideration paid to the local authorities on account thereof should be refunded.

Very respectfully,

JOHN W. GRIGGS.

The PRESIDENT.

VESSELS—REGISTERS—HAWAII.

The issuance of registry to a vessel, entitling it to carry national colors, is an act of sovereignty, although the register itself is not the only document recognized by the law of nations as indicative of the ship's national character.

The Hawaiian authorities can not in anywise certify to the national character of a vessel, as Hawaiian national character can no longer be attributed to vessels owned by inhabitants of the islands.

The registration laws of Hawaii have been abrogated as a necessary consequence of its annexation to the United States.

An order of the Executive suspending the issuance of Hawaiian registers would be a legal exercise of power under the resolution of Congress annexing Hawaii.

DEPARTMENT OF JUSTICE,

September 12, 1899.

SIR: Your letters of August 5 and August 9, with their inclosures, relative to the issuance of Hawaiian registers to vessels, are at hand.

The decision of the supreme court of the Hawaiian Islands, a copy of which you send, determines, in relation to applications for writs of mandamus to compel the issuance of Hawaiian registers to certain vessels, that the Hawaiian registry laws are a part of the municipal legislation of those islands remaining in force by the terms of the resolution of annexation, and that Congress manifested no particular intention to abrogate the Hawaiian registration laws immediately upon annexation, but manifested a general intention to continue those laws. The said applications were, however, by this opinion denied upon other grounds, but the cases have been reopened for the determination of a certain question of fact not material to the present inquiry. Nevertheless, the question of law now before us was definitely ruled by that opinion, and since the Treasury Department has taken the ground that vessels should not be authorized to receive Hawaiian registers and fly the Hawaiian flag after July 7, 1898, you suggest that the only remedy for the situation is an Executive order suspending the issuance of Hawaiian registers, as a recent Executive order suspended the holding of a general election in the island provided for under the Hawaiian constitution; and you request my opinion as to the legality of such an order of the Presi-

dent, to be procured and issued at your instance, under the resolution of Congress for the annexation of Hawaii.

Under these circumstances, therefore, the question is fairly a legal question and one arising in the administration of your Department. It is obviously a question of high importance and commands careful consideration from the legal standpoint as well as from the standpoint of wise governmental policy.

The decision of the supreme court of Hawaii is based upon the view of Chancellor Kent (3 Com., * p. 149), who says: "The registry is not a document required by the law of nations as expressive of a ship's national character. The registry acts are to be construed as forms of local or municipal institutions for purposes of public policy." But it is evident that while Chancellor Kent finds the source of registration in municipal law and not in the law of nations, the character of registration as a governmental act is national and expresses sovereignty. The issuance of registry to vessels entitling them to carry national colors is an act of sovereignty, although the register itself is not a document required by the law of nations as indicative of a ship's national character; for this can be shown in other ways, as, for instance, by a consular certificate attached to the bill of sale of a vessel to an American citizen. This is evidence of national character and entitles the vessel under the consular regulations to the protection of the flag. Sea letters are also at times evidence of the national character of a vessel, and a bill of sale also is such evidence. Chancellor Kent himself says, as chief justice of the supreme court of New York, in the case of *Barker v. Phoenix Ins. Co.* (8 Johns., 307, 319), referring to two kinds of American vessels, the one-registered and the other unregistered and carrying a sea letter or an official certificate of ownership: "But in reference to the law of nations and to security upon the high seas, both species of vessels were equally entitled to protection as American property."

While thus there are other documents which impress national character upon a vessel, the register is the usual and most complete evidence of such character, and the fullest charter of the rights dependent thereon.

It is to be noted in passing that the Hawaiian register is, by the terms of the Hawaiian law, even more clearly an international document than the American register (secs. 1000-1003, Civil Laws of the Hawaiian Islands, 1897, c. 69, Registry of Foreign Vessels, p. 412).

Beyond question a vessel's register announces nationality, and registration laws, though municipal in origin or even in character (in the terminology of classification of different branches of the law), assert necessarily and before anything else the sovereignty of the government by which they are enacted and enforced. Therefore Chancellor Kent's statement in the Commentaries (*supra*) is to be taken as meaning that the law of nations recognizes various ways of holding out a ship's national character, and does not require the peculiar form known as a register; but it is not to be taken as meaning that registration is a matter merely of local law, and does not affect, or is not affected by, matters beyond the local domain.

Now, the joint resolution of Congress for the annexation of the Hawaiian Islands provides generally that "the municipal legislation of the islands * * * not inconsistent with this joint resolution * * * shall remain in force until the Congress of the United States shall otherwise determine." And by the preamble to the resolution the absolute and unreserved cession of all rights of sovereignty of whatsoever kind by the Hawaiian government to the United States is evidenced. Again, although there is a Hawaiian *government*—the continuation under the terms of the resolution of a government long existing there as an independent autonomy—the language and the spirit of the resolution necessarily require the extinction of Hawaiian *nationality* and *sovereignty*; the two very things above all others which the register of a vessel expresses.

In my opinion, therefore, the Hawaiian authorities can not in any way certify to the Hawaiian character of a vessel, for the Hawaiian national character can no longer be attributed to vessels owned by inhabitants of the islands. Under the law of nations, vessels bearing any form of certificate of Hawaiian national character at the time of annexation must look to the United States for protection on the high seas and in foreign ports. Their *national* character has become American.

It is not necessary now to consider what all the consequences of this view may be, and what form of certificate of American national character may properly be issued to vessels belonging to Hawaiians, pending Congressional action, although there appears to be authority under the consular regulations for giving such vessels the protection of our flag. With due respect to the judgments of the supreme court of Hawaii, I am unable to admit that a Hawaiian registry can now be issued to a vessel and the flag of Hawaii, the usual token of registration, be flown by her; for although the Hawaiian registry law is conceded to be a municipal law (in its origin, as indicated, but by no means *merely* a municipal law in its field of operation and effects), its application since annexation is totally inconsistent with that portion of the resolution by which the Hawaiian government ceded absolutely and without reservation all rights of sovereignty of whatsoever kind to the United States. By the very language of the resolution municipal legislation inconsistent with the resolution shall not remain in force, and upon these views I am constrained to hold that the registration laws of Hawaii have been abrogated as a necessary consequence of annexation.

It therefore follows that in my opinion an order of the Executive suspending the issuance of Hawaiian registers would be a legal exercise of power under the resolution of Congress for the annexation of Hawaii.

Very respectfully,

JOHN W. GRIGGS.

The SECRETARY OF THE TREASURY.

OPINIONS—COMPTROLLER OF THE TREASURY.

The decision of the Comptroller of the Treasury upon any question involving a payment is final and binding.

On questions of disbursements of money or payment of claims the Attorney-General should not render opinions.

DEPARTMENT OF JUSTICE,

September 13, 1899.

SIR: I have the honor to acknowledge the receipt of your communication of August 1, with its inclosures, wherein

you submit the facts as to the claim made on behalf of Mr. James Ross Collins for additional compensation "on account of the prevention and detection of frauds upon the customs revenue," by which it appears that Mr. Collins furnished original information relative to certain fraudulent importations and has heretofore been awarded compensation under section 4 of the antimoietty act (June 22, 1874, 18 Stat., 186) in the maximum amount allowed under said act; and that upon his application for an additional amount under the act of March 3, 1879 (20 Stat., 386), making an appropriation "for the detection and prevention of frauds upon the customs revenue," the Comptroller of the Treasury, upon reference by your predecessor, held (1 Comp. Dec., 563) that the language of the antimoietty act applied accurately to Mr. Collins's case; that the appropriation thereunder was specific and exclusive, and that therefore the Secretary of the Treasury was not authorized to pay the claimant compensation under the act of 1879, *supra*.

It is also, I am informed, matter of record that the same question was considered by the present Comptroller of the Treasury in another case and the prior decision approved and followed. (Decision, December 16, 1897; MSS. vol. 5, Comp. Dec., p. 787.) Mr. Collins's claim has now been presented to you again, and it is contended on his behalf that the Comptroller's opinions are "extra-official" and are not binding upon the Secretary; that the construction adopted virtually destroys the efficiency of the act of 1879 so far as it relates to this question, and that the Secretary may properly award the claimant such further sum out of the appropriation under that act as in his judgment is just. Upon this situation you request an expression of my views.

The view that the opinions of the Comptroller rendered to the Secretary of the Treasury upon legal questions are purely extra-official and rendered by courtesy only (20 Op., 654, dated September 8, 1893) is no longer tenable, for by section 8 of the act of July 31, 1894 (28 Stat., 208), " * * * the head of any Executive Department * * * may apply for and the Comptroller of the Treasury shall render his decision *upon any question involving a payment to be made*

by [him] or under [him], which decision, when rendered, *shall govern the Auditor and Comptroller of the Treasury in passing upon the account containing said disbursement.*"

And various opinions of my predecessors rendered since the passage of the act of 1894 announce the conclusion that the decision of the Comptroller upon such a question is final and binding.

"If a claim is presented, the question of the legality of payment is one exclusively for the Comptroller, whose decision thereon is, by statute, made final as to all executive officers. It has been repeatedly held by Attorneys-General that on questions of disbursement of money or payment of claims * * * the Attorney-General should not render opinions, especially in view of the fact that, if the matter is doubtful, it can be referred to the Court of Claims for authoritative decision." (21 Opin., 530; see also 21 Opin., 178; Id., 181; Id., 188.) Concurring in the views and reasons set forth by these authorities, it is unnecessary and inappropriate for me to express my views more at large or enter upon the merits of the question. I return the inclosures of your letter herewith.

Respectfully,

JOHN W. GRIGGS.

The SECRETARY OF THE TREASURY.

INTERNATIONAL LAW—HAWAII—COURT OF CLAIMS.

In case of the annexation of a State or cession of territory, the substituted sovereignty assumes the debts and obligations of the absorbed State or territory, taking the burdens with the benefits.

The exception to this rule occurs where it is otherwise expressly provided by treaty stipulation, or the instrument of cession, when the absorbed territory becomes an integral part of the acquiring State, and is altogether merged in it, as in the case of the transfer of contiguous territory to a monarchy.

Where there is a distinct and independent civilized government, potent and capable within its territorial limits, conducted by a separate executive, not acting as the mere representative by appointment of the distant central administration, such government should respond out of its separate assets to any valid claims upon it.

Certain claims against Hawaii which accrued prior to annexation and which have been presented to the Department of State should properly be presented to, considered, and paid by the Hawaiian government, but all such claims should first be received by the Department of State, through diplomatic channels, and then be transmitted to the government of Hawaii for adjustment.

Citizens of the United States may present their claims against the Hawaiian government, or take such other proceedings in court as the municipal laws of Hawaii allow.

Questions such as are involved in these claims may be submitted to the Court of Claims for determination.

DEPARTMENT OF JUSTICE,

September 20, 1899.

SIR: Your letter of the 3d instant, with its inclosures, brings to my attention certain claims against Hawaii arising prior to annexation—some in favor of citizens or subjects of foreign States and others in favor of citizens of the United States—which have been presented to the State Department and allowance thereof asked against this Government as the successor to the sovereignty of Hawaii; and suggests the questions whether these claims were extinguished by the act of annexation or, under the terms of said act and principles of international law, have become, so far as valid against Hawaii, just and legal claims against the United States; and if so, whether the Department of State must entertain and adjust them diplomatically or may refer them to the Court of Claims for findings of facts and conclusions of law.

Upon these facts and questions you request to be advised whether this Government became responsible for such valid claims against Hawaii, and whether you may not properly refer all of them to the Court of Claims, as suggested.

In reply, I have the honor to advise you that the general doctrine of international law founded upon obvious principles of justice is, that in case of annexation of a state or cession of territory, the substituted sovereignty assumes the debts and obligations of the absorbed state or territory—it takes the burdens with the benefits. Mr. Adams, when Secretary of State, expressed the principle thus, extending it even to the case of acquisition by conquest:

“The conqueror who reduces a nation to his subjection receives it subject to all its engagements and duties toward others, the fulfillment of which then becomes his own duty.”

(1 Whart. Int. Law Dig., sec. 5.)

The subject is discussed by Mr. Hall (*International Law*, 4th Ed., pp. 104, 105) and in Rivier (*Principes du Droit des Gens*, I, pp. 70-72, note, and authorities and instances cited).

No fair exception to this rule can be perceived, unless expressly provided for by treaty stipulations or the instrument of cession, when the absorbed territory becomes an integral part of the acquiring state, and is altogether merged in it, as in the ordinary case of transfer of a contiguous territory to a monarchy, in which, although municipal lines of division into departments or provinces may run, the sovereignty extends everywhere alike and leaves only a circumscribed field for local autonomy. The General Government administers everywhere equally, performs the local as well as the general functions of the nation, and virtually absorbs the new territory on these terms. Where the federal idea obtains, this is not so. It is only necessary to indicate by reference to our own scheme of government the notion of sovereign States and responsible Territorial administrations making their own local laws through representative assemblies, entering into contracts, possessing separate revenues and treasury, liable for their engagements and obligations, and exercising through the whole domain of local autonomy the powers of a distinct government. Nor is the attribute of sovereignty to be regarded as the sole test throughout the whole situation of the nature of the relation to the General Government or the rest of the world. If there is a distinct and independent civilized government, potent and capable within its territorial limits, conducted by a separate executive, not acting as the mere representative by appointment of the distant central administration, I perceive no reason to doubt that such government rather than the central authority should respond out of its separate assets to any valid claims upon it, whether accruing in the past, presently accruing, or to accrue in the future. It does not matter what is the exact nature or extent of the connection between the principal state and the dependent possession so long as the latter possesses its own organized government and is not a mere unorganized dependency. The foreign colonial systems have long recognized the distinction between possessions which are the subject of executive rather than

legislative administration and control—that is, which are directed and ruled by the executive responsible to the constitutional parliament or assembly—and those which are autonomous.

There is nothing in the Hawaiian resolution of annexation which gives the negative to this theory. On the contrary, the power to continue the existing government and its continuation in fact are an assumption of the views here stated; as a logical consequence of which, although the doubt as to the exact nature of Congressional action may impose a not unreasonable delay upon the Hawaiian authorities in the consideration and settlement of pending claims, such claims if valid (being apparently, as indicated in the memorandum accompanying your letter, the claims mentioned on pages 111 *et seq.* of the Hawaiian report, Senate Doc. No. 116, third session Fifty-fifth Congress), and similar claims which may arise hereafter should properly be presented to and be considered and paid by the Hawaiian government. And the dilemma by which, under the separated governmental entities, the Federal authority is not liable for the demand, and the State authority has no international relations, and therefore escapes a perfect obligation, is apparent rather than real. The historic complaint as to this situation is not in reality well founded, and in the forum of nations the just liabilities to claimants and obligations to civilization of a State of this Union have been for the most part met by the State or recognized by the United States in its sovereign grace. But the legal liability is that of the inferior member of the federation rather than of the federation itself.

Take the case of Texas as an example, in which, finally, part of the proceeds of a grant of land to the United States and a pledge of the customs duties locally collected were applied to the discharge of the funded debt of the State. The United States resisted responsibility on the theory here advanced, and the foreign contention was based upon the ground that the specific transfer of assets for the purpose raised the national liability, and this contention was accompanied by an express disclaimer that the annexation of itself imposed the responsibility on the substituted and absorbing power. Of course, Texas, while losing its nationality,

retained its corporate existence as a State of the Union, and I have here endeavored to point out that the crucial test is the separated and autonomous government and not the attribute of sovereignty.

It is beyond question that a claim on foreign behalf against a State or Territory of the Union would be presented through, rather than to, the State Department; that is, it would be presented to the local and not to the Federal Government, and would be finally adjusted and recognized or denied by the former, although the Federal Government is the international representative, and in various ways, short of coercion of a State—as unnecessary, ordinarily, as it is impossible—admits a certain international liability. So, I conceive, the separate colonial government of a European monarchy would settle and pay just foreign claims against itself, although they would be presented through the foreign office of the home Government. In no respect, save a temporary delay in the process of adjustment, am I able to see that the situation as to Hawaii differs from that just stated, and I am hence of the opinion that the function of the State Department with relation to such foreign claims is to receive them through diplomatic channels, and transmit them to the government of Hawaii for adjustment. As to such claims on behalf of citizens of the United States, there is nothing to prevent the claimants from presenting the same at once to the Hawaiian authorities, or taking such other steps by proceedings in court as the municipal laws of Hawaii, preserved for the most part by the resolution, may allow. And an application to Congress is open on behalf of both classes of claimants.

From the foregoing it will be seen that strictly your questions fall; but the form of your query requests me to advise you whether you must adjust these claims diplomatically or may refer them to the Court of Claims. It is not necessary for me in this connection to consider in detail the jurisdiction of the Court of Claims, which has been exhaustively reviewed and classified in the case of *The United States v. New York* (160 U. S., 598, 615). Just as any claim may be submitted to the court on the voluntary petition of the claimant, including those of aliens, however the court may finally

dispose of it on grounds of their own jurisdiction, or on the merits, so, I conceive, may such questions as the present one be submitted by the heads of Departments to the court for their final or partial determination under the law, which they may or may not consider proper for them to entertain. Furthermore, on some of the grounds inviting this reference it may be argued with force that such reference is pertinent and proper; but, holding the views at the threshold of the case which I have here expressed, and considering that in providing for the settlement of claims against the United States, whether founded upon contract or tort, and in carving out the jurisdiction of the Court of Claims, Congress has found it necessary or desirable to legislate affirmatively and to define and limit the jurisdiction of the court accurately, it would not be consistent for me to advise you to elect to make the reference, both because such determination lies largely in the region of your own administrative discretion, and because, with my notions of the situation, I might, as the law officer of the Government charged with the defense of suits against the United States, deem it advisable to challenge the jurisdiction of the court. Although in the previous and different case to which you refer I advised you that certain disputed facts and controverted questions of law arising in consequence of adjudications in prize courts—which substantially terminated the jurisdiction therein, and did not embrace, originally or under the right of appeal, certain foreign claims, although the decrees justified the same—might properly be referred to the Court of Claims, it is sufficient to say that the questions there, on the merits of such reference, were quite different from those now presented, and that the legal reasons in my judgment affecting your administrative discretion to make the reference were far stronger.

The subject goes off then, so far as I am properly concerned, on the view that all the claims against Hawaii embraced in your query should be presented to the government of Hawaii according to the respective methods appropriate to their character, as indicated herein.

Very respectfully,

JOHN W. GRIGGS.

The SECRETARY OF STATE.

COURT-MARTIAL—CHARGES—TESTIMONY.

There is no objection to the joinder of separate and incongruous charges in the same prosecution before a court-martial, as such is permitted by military usage and procedure.

Testimony tending to show such a relation or understanding between alleged conspirators as would be indicative of a purpose to defraud the Government by means of contracts for public works to be given out and carried on under charge of the accused would be admissible, even though it related to matters antedating the time of the particular conspiracy charged.

In conspiracy cases, proof of the acts and declarations of the alleged conspirators may be introduced, although not properly admissible at the time because community of intent and design had not been established; but if received, the error may be cured by the subsequent introduction of proof of the conspiracy existing at the time the alleged declarations were made.

The evidence failing to show satisfactorily fraudulent knowledge and purpose on the part of Captain Carter with reference to certain minor specifications of offense upon which he was found guilty by the court-martial, he should have been acquitted on that ground as to these charges.

In the absence of any such error of the court in the admission or rejection of testimony as would work or was liable to work injury to Captain Carter, there is no reason on these grounds to disturb the findings of the court.

The court-martial that tried Captain Carter was justified in its finding of guilty upon the charges and specifications relating to the contracts of September, 1896, and the finding and sentence of the court with respect thereto should be approved.

DEPARTMENT OF JUSTICE,

September 29, 1899.

SIR: Capt. Oberlin M. Carter, an officer of the Engineer Corps of the United States Army, was found guilty by a general court-martial of the following charges and specifications:

“CHARGE I.—Conspiring to defraud the United States, in violation of the sixtieth article of war.

“*Specification 2.*—In that the accused did unlawfully combine with The Atlantic Contracting Company, John F. Gaynor, William T. Gaynor, Edward H. Gaynor, and Anson M. Bangs, and others, to obtain the allowance and payment of certain false and fraudulent claims against the United States, to wit, \$230,749.90 for certain works of improve-

ment in Savannah Harbor and \$345,000 for certain improvements in Cumberland Sound, which sums, respectively, the accused did, in pursuance of said conspiracy, cause to be paid out of the moneys of the United States to The Atlantic Contracting Company on or about July 6, 1897.

“CHARGE II.—Causing false and fraudulent claims to be made against the United States, in violation of the sixtieth article of war.

“*Specification 6.*—In that the accused, being the officer in local charge of the river and harbor improvements in the Savannah River and Harbor districts, did cause two false and fraudulent claims, one of \$230,749.90 and the other of \$345,000, to be made against the United States, knowing the same to be false and fraudulent, and so knowing did certify to their correctness.

“*Specification 7.*—In that the accused caused to be entered on a Government pay roll the names of sundry persons as laborers, and did cause to be paid to them certain sums for services as laborers, whereas none of such persons had rendered services as laborers, and the accused knew such claims were false and fraudulent.

“*Specification 8.*—For fraudulently allowing an account of \$121.60 of The Atlantic Contracting Company against the United States for piling in repairing the Garden Bank training wall.

“*Specification 9.*—For fraudulently allowing an account of \$384 to The Atlantic Contracting Company for pile work.

“*Specification 10.*—For fraudulently allowing an account of \$108.80 to The Atlantic Contracting Company for pile dams.

“CHARGE III.—Conduct unbecoming an officer and a gentleman, in violation of the sixty-first article of war.

“*Specification 2.*—For willfully and knowingly causing to be paid out of the moneys of the United States under his control two certain false accounts, one for \$230,749.90 and the other for \$345,000 to The Atlantic Contracting Company.

“*Specification 3.*—For making a false statement to the Chief of Engineers as to new soundings for work in Savannah Harbor, with intent to deceive.

"Specification 4.—For falsely entering on the pay roll the names of certain persons as laborers to an amount of \$29.50.

"Specification 5.—For falsely certifying as correct an account of The Atlantic Contracting Company for \$121.60.

"Specification 6.—For falsely certifying as correct an account of The Atlantic Contracting Company for \$384.

"Specification 7.—For falsely certifying as correct an account of The Atlantic Contracting Company for \$108.80.

"Specification 9.—For indorsing a certain false statement on a letter from the Chief of Engineers as to rentals on property proposed to be acquired by the United States at Savannah.

"Specification 11.—For failing to account for the sum of \$132.10, money of the United States; received by the accused from Alfred Hirt.

"Specification 22.—For making false reports as to his absence from his station.

"CHARGE IV.—Embezzlement, as defined by section 5488, Revised Statutes of the United States, in violation of the sixty-second article of war.

"Specification 1.—Misappropriation by fraudulent means, of \$230,749.90 and \$345,000, moneys of the United States, intrusted to the accused as a disbursing officer of the Government."

Upon these findings the court-martial sentenced the accused to dismissal from the service of the United States; to suffer a fine of \$5,000; to be confined, at hard labor, at such place as the proper authority may direct, for five years, and the crime, punishment, name, and place of abode of the accused to be published in the newspapers in and about the station and in the State from which the accused came or where he usually resides.

The one hundred and sixth article of war provides that in time of peace no sentence of a court-martial directing the dismissal of an officer shall be carried into execution until it shall have been confirmed by the President. This statutory provision made it necessary that the proceedings of the court-martial, including the evidence, should be submitted to the President for approval before the sentence in this case, which involved dismissal, could become effective. The

record and proceedings were accordingly transmitted to you, and grave questions of law arising in the course of the trial relating to the admission of evidence and other alleged defects in the proceedings, and a denial of the correctness of the findings of the court-martial upon the matters of fact involved in the case being suggested to the President on behalf of the accused, I have been directed by Your Excellency to examine the record, and to advise you whether it contains any matter of legal error or any unjustified conclusion of fact on the part of the court-martial which would render it the duty of the President to withhold his approval of the findings of the court-martial, or any part thereof, and generally to advise Your Excellency as to the action you should take upon the record as transmitted to you from the court-martial.

In pursuance of this instruction I have given careful attention to the very voluminous matters contained in the proceedings; have attentively read all of the testimony as transcribed by the official stenographer at the trial—testimony which comprises about 5,000 pages of typewritten manuscript; have examined the numerous paper writings and other exhibits offered in evidence, including the bank accounts, checks, and vouchers of the accused and others; have read and considered the briefs of the different counsel for the accused, and have heard oral argument in his behalf, and, having reached a conclusion as to the various questions raised by this reference and argued on behalf of the accused before me, I have the honor to transmit herewith my report and advice thereon.

The grounds upon which the authority to disapprove a finding of a court-martial may be properly exercised are very satisfactorily stated by Colonel Winthrop in his treatise on military law, volume 1, page 640. He states that these grounds are mainly of two classes—

“Some going to the legal validity or to the regularity of the proceedings, and others to the justice or expediency of allowing the judgment to stand or the sentence or punishment to be enforced. Thus where the court was not legally constituted or composed, or was without jurisdiction of the offense or the offender, or proceeded with the trial when

below the minimum of members; or where the record discloses irregularities which, though not amounting to fatal defects, are of a gross character; or where the accused has been denied material testimony, or otherwise prejudiced in his defense; or the findings or a part of them are unwarranted by the testimony; or the sentence itself is inadequate to the offense, or too severe or quite unmerited, or imposes a punishment not authorized by law—in any such case the reviewing officer may, in his discretion, withhold his approval from and formally *disapprove* the sentence, in whole or in part, as the law or facts may require or render proper. His discretion, indeed, is here without restriction; its exercise does not depend upon the quality of his reasons; whether or not *any* reasons are stated by him, or whether his actual reasons are in point of fact good and sufficient or the reverse, the disapproval is equally effective in law. At the same time he will, of course, not properly disapprove without good reason—without better reason than the court had for the action which he fails to approve. Where, for example, the evidence in the case was conflicting, and it is apparent that the court, having the witnesses before it, must have been the best judge of their relative credibility and of the weight of the testimony, it will in general be wiser for the reviewing officer to defer to, rather than disapprove, its conclusion. Nor will he properly disapprove a sentence on account of a mere error on the part of the court which does not affect the merits or impair the final judgment—as, for instance, an improper rejection of testimony offered by the defense which, however, would have added to the case no material facts.”

No objection is made on behalf of the accused to the constitution or composition of the court, or as to its jurisdiction of the offense or the offender.

The objections urged are: First. That the findings of the court as to those specifications upon which the defendant was found guilty were not justified by the evidence in the case, and that the accused should have been acquitted upon each and every of them. Second. That the judge-advocate in charge of the case improperly joined in the same prosecution different charges of an unconnected and incongruous

nature, and proceeded to try the same at one trial and before one and the same court, contrary to the law of the land. Third. That the court-martial, against the objection of the accused, admitted illegal evidence on the part of the Government. Fourth. That the court-martial, upon the objection of the judge-advocate, refused to admit in evidence certain material matters offered on behalf of the accused, the rejection of which prejudiced his rights.

As to certain of the minor specifications of offense against the accused, upon which he was found guilty by the court-martial, I have come to the conclusion, after a careful examination of the evidence, that the facts proved did not justify beyond a reasonable doubt the finding of guilty. These particular specifications are:

Charge II, specification 7, to the effect that the accused caused to be entered on a Government pay roll the names of sundry persons as laborers, and did cause to be paid to them certain sums for services as laborers, whereas none of such persons had rendered services as laborers, and accused knew such claims were false and fraudulent. Specifications 8, 9, and 10 of Charge II, for fraudulently allowing accounts of The Atlantic Contracting Company against the United States for \$121.60, \$384, and \$108.80, respectively.

Charge III, specification 3, for making a false statement to the Chief of Engineers as to new soundings for work in Savannah Harbor with intent to deceive. Specification 4, for falsely entering on a pay roll the names of certain persons as laborers to the amount of \$29.50. Specifications 5, 6, and 7, for falsely certifying as correct accounts of The Atlantic Contracting Company for \$121.60, \$384, and \$108.80, respectively. Specification 9, for indorsing a false statement on a letter from the Chief of Engineers as to rentals on property proposed to be acquired by the Government at Savannah. Specification 11, for failing to account for \$132.10, money of the United States, received from Alfred Hirt. Specification 22, for making false reports as to his absence from his station.

As to each and every of these last-mentioned specifications, I am of the opinion that the evidence fails to show satisfactorily fraudulent knowledge and purpose on the part of

Captain Carter, and that he should, on that ground, have been acquitted on these charges, and I therefore recommend that the findings of the court-martial as to these particular specifications be disapproved.

I do not think the objection taken on behalf of the accused to the joinder of separate and incongruous charges in the same prosecution is well founded.

It is laid down in works on military law that care should be taken that all the charges and specifications to which the party may be subject be preferred together. Unlike the ordinary criminal procedure, where but one indictment, setting forth (in one or more counts) a single offense or connected criminal transaction, is in general brought to trial at one time, the military usage and procedure permit of an indefinite number of offenses being charged and adjudicated together in one and the same proceeding. And, with a view to the summary and final action so important in military cases, whenever an officer or soldier has been apparently guilty of several or many offenses, whether of a similar character or distinct in their nature, charges and specifications covering them all should, if practicable, be preferred together, and together brought to trial. (1 Winthrop on Military Law, 201.)

This practice appears to have been followed uniformly in court-martial proceedings, especially during the late civil war. An instance is cited where in one case sixty-one different acts of offense were grouped together in one proceeding.

It is not necessary to discuss whether this practice is wise or whether it is prejudicial to the rights of the accused. It appears to be established by long-continued practice, and, so far as I am able on investigation to discover, without previous challenge.

Even if this objection were well founded, which it is not, I do not think the accused should be allowed to avail himself of the objection now, because he proceeded to trial without objection to this alleged misjoinder and permitted the court to enter on an investigation of all of the different specifications, and himself brought forward his defense as to each of them. An objection of this kind should be promptly taken, not only in order to save the trouble and expense of

a fruitless trial, but also to save the Government from the danger of an interposition of the bar of the statute of limitations in case the findings upon charges so grouped should be afterwards disapproved on this ground. .

Objection was made and strenuously urged by counsel on behalf of the accused to the admission by the court of evidence with relation to certain contracts and other transactions in which the accused had participated as to which in the charges he had been formally charged with misconduct, and as to which he had pleaded the statute of limitations, it being alleged that after such a plea effectively interposed no evidence relating to the subject-matter of the transactions so barred was admissible.

The evidence thus objected to was not offered for the purpose of proving against the accused the particular offense as to which he had interposed this protective plea, nor of having him declared guilty thereof, but for the purpose of showing the relation between the accused and the other alleged conspirators, the intent and motive of the accused and the other alleged conspirators, and their course and conduct with reference to matters of a nature similar to those, and in many respects connected with those, involved in the transaction under trial.

For this purpose I think the evidence was admissible and that no error was committed in that respect by the trial court.

Other objections relate to the admission of evidence of conversations and acts of alleged coconspirators antedating the time of the particular conspiracy charged.

I think such evidence was admissible. Testimony tending to show such a relation or understanding between the alleged conspirators as would be indicative of a purpose to defraud the Government by means of contracts for public works to be given out and carried on under the charge of the accused would be admissible, even though it related to matters antedating the time of the particular conspiracy charged.

The intent, knowledge, or motive under which the defendant did the act charged against him not generally admitting of other than circumstantial evidence, may often be aided

in the proofs by showing another crime, actual or attempted. (I Bishop's Criminal Procedure, sec. 1126, and cases cited.)

Persons performing connected overt acts, all contributing to the same result and consummation of the same offense, may, by the circumstances and their general connection or otherwise, be satisfactorily shown to be conspirators with the same general end or object in view. (*United States v. Cole*, 1 McLean, 513.)

It is well understood, as a rule of evidence in conspiracy cases, that proof of the acts and declarations of an alleged co-conspirator may be introduced, and even though they may not be properly admissible at the time when introduced in evidence, because community of intent and design has not been established, yet if such evidence be received the error may be cured by the subsequent introduction of proof of the existence of the conspiracy at the time the alleged declarations were made.

Objection was strenuously made to the admission by the court of a letter written by the witness Cooper to Captain Gillette. I have doubts as to the propriety of this letter as evidence for any purpose, but the purpose for which it was admitted was to explain the testimony of Cooper as to a point which upon cross-examination counsel for the accused had endeavored to show tended to discredit the testimony of that witness. It was admitted for the purpose of rebutting this reflection upon the veracity of the witness, and had no probative force for any other purpose. I do not see how the admission of the letter, even if erroneous, could have injuriously affected the accused.

Another objection urged on behalf of the accused is that certain private papers belonging to him were illegally seized by the authorities and illegally retained against his protest, and illegally used as evidence on the trial. It is contended that the facts show that the alleged seizure of these papers constituted an unreasonable seizure of private papers, contrary to the provisions of the Federal Constitution in that respect.

I am of opinion, in the first place, that the facts do not show such an unreasonable seizure as is forbidden by the constitutional prohibition.

In the second place, even if the seizure was unlawful, I think the accused practically consented to the use subsequently made of the papers, although it is true that he tried to withdraw that consent prior to the use of the papers as evidence.

In the third place, conceding that the seizure was unlawful and was not acquiesced in by the defendant, yet that did not render the papers incompetent to be offered and used as evidence in the case.

When in an actual trial in court one party or the other produces a paper in his own possession and offers it, the trial can not be interrupted in order to dispose of a collateral issue as to the lawfulness of the possession by the party having actual control of the document. An action of trover or of replevin can not conveniently be injected into the trial of another case. That this is the law appears satisfactorily from the cases of *Leggatt v. Tollervey* (14 East, 3002) and *Commonwealth v. Dana* (2 Metcalf (Mass.), 329). In the latter case Mr. Justice Wilde says:

“If the search warrant were illegal, or if the officer serving the warrant exceeded his authority, the party on whose complaint the warrant issued or the officer would be responsible for the wrong done; but this is no good reason for excluding the papers seized as evidence if they were pertinent to the issue, as they unquestionably were. When papers are offered in evidence the court can take no notice how they were obtained—whether lawfully or unlawfully; nor would they form a collateral issue to determine that question.”

I do not think the decision of the United States Supreme Court in the case of *Boyd* (116 U. S., 616) is in conflict with this rule.

These are the most prominent objections to admitted evidence urged before me by Captain Carter's counsel. There are others, similar in nature, presented in the briefs, which I do not deem it necessary to particularly refer to, as none of them is any stronger nor any better founded in law than those which I have already discussed. It is sufficient to say that I find in the record no illegal evidence admitted by the court which could reasonably be supposed to have

worked an injury to the accused, and it is a well-understood principle of law as administered by the civil courts, even in criminal cases, that no judgment should be reversed in a court of error when the error complained of works no injury to the party against whom the ruling was made.

Nor do I find that the court erred in refusing to admit in evidence any of the matters offered in behalf of the accused on the trial and by the court excluded. Almost all the testimony offered by the accused was admitted, the most notable exception being a letter written by R. F. Wescott to the accused, dated October 18, 1897. I see no ground upon which this could be evidence in behalf of the accused. It was a mere voluntary statement in a letter, addressed to the accused by his father-in-law, and had no sanctity of an oath about it, and in no respect amounted to anything more than a voluntary statement by a relative and friend of the accused made in writing, without any opportunity on behalf of the judge-advocate to cross-examine. It could in no sense be regarded as legal evidence of the facts stated in it, and it was for the purpose of proving those facts that the letter was offered.

I find, therefore, in the record no such error of the court in the admission or rejection of testimony as has worked, or was liable to work, any injury to the accused, and have the honor to advise you that on these grounds there is no reason to disturb the findings of the court.

We are therefore brought to a consideration of the evidence, and to the inquiry whether the testimony justified the conclusion of guilt as to the main charges upon which the accused was convicted by the court.

The personal intimacy of the accused with Greene and the Gaynors; the method of advertising for proposals for the work; the manner in which copies of the specifications were given out by and under the direction of Carter; the method of receiving and awarding the contracts; the form in which the specifications were drawn, leaving it optional with the engineer to order any one of the three different classes of mattresses; the fact that the cheapest class was ordered to be furnished by Carter after the contracts had been awarded to The Atlantic Contracting Company; the fact that that com-

pany was only a mere form or skeleton of a corporation, used practically as a business name for the alleged co-conspirators Greene and Gaynor; that it held no meetings, declared no dividends, the moneys paid to it being unofficially divided up between Greene and Gaynor as fast as collected from the Government; the frequent practice of cashing the Government checks over the counter of the subtreasury in New York, instead of following the usual course of collection through a bank of deposit and the clearing house; the special exertion of the accused to expedite the payments of the two sums of \$230,749.90 and \$345,000 in July, 1897; the presence of Captain Carter in New York when these checks were delivered to John F. Gaynor, who promptly passed them into the hands of Greene, by whom they were collected; the admittedly large profits made by the contractors on the contracts—profits which, if the very persuasive testimony of the witnesses for the Government be accepted, were not merely large, but enormous. All these, with numerous other proven facts, might justly be considered as failing to fix upon the accused criminal knowledge and purpose to defraud the Government if it were shown that he had no corrupt personal motive; that he had not profited by these loose methods and irregular and questionable proceedings. As to some of them, he seems justified in citing the prevalent custom of other officers of unquestioned integrity in the Corps of Engineers. If his conscience is as clear as theirs admittedly was, he can not be held responsible as a criminal. But if it be shown that what they did from carelessness or incapacity or in pursuance of long-established custom he did with a criminal purpose; that he took advantage of bad customs or loose regulations or insufficient official supervision in the Department in order to facilitate the assignment to his friends of fraudulent contracts and to arrange for the collection of fraudulent profits resulting therefrom, to be subsequently divided among the conspirators and himself, then he is guilty; and the fact that his brother officers have practiced more or less the criticisable methods followed by him has no force whatever as excuse or explanation.

So it becomes of vital importance to inquire whether the proofs in this case fasten upon Captain Carter participation

in the moneys alleged to have been wrongfully and unjustly obtained by his friends out of the United States Treasury. If he did not profit by his conduct, then all the accusatory force of the circumstances alleged against him is dissolved. But if he is shown to have shared in the proceeds, then all those circumstances assume the aspect of apt and skillful artifices employed by him to assist in the scheme of fraud.

The contracts involved in the charges now under consideration are those for improvements in Savannah Harbor and Cumberland Sound, entered into in September, 1896. No payments on account of the work were made to the contractors until the delivery of the checks above referred to by Captain Carter in person to John F. Gaynor, in New York City, on or about July 6, 1897. Greene and the Gaynors, under one name or another, had been engaged in prosecuting contract work for the Government in Captain Carter's district almost continuously from 1888 down to the time of Captain Carter's retirement from that station in the fall of 1897. Prior to 1890 Captain Carter's income and expenses were practically confined to his army pay of \$184 per month and to occasional fees earned by him from private parties or municipal corporations as consulting engineer, probably in no year amounting to more than \$3,000 or \$4,000.

In October, 1890, Captain Carter married the daughter of Robert F. Wescott, of New York City, a man of considerable wealth, but just how much it does not appear. In 1891 he was receiving a captain's pay of \$252.67 per month. Beginning with the year 1891 and continuing down to 1897 his personal expenditures increased at a very rapid rate. For 1891 they were \$6,047.83; for 1892, \$8,354.24; for 1893, \$14,569.14; for 1894, \$14,410.31; for 1895, \$20,113.92; for 1896, \$29,611.67. It is conceded that at the time of his marriage Captain Carter was possessed of no real or personal property worthy of mention.

In 1892 Carter began to make notably large deposits in the Union Trust Company in New York, where he kept an account in his own name, and also began to buy through brokers in New York investment securities. For instance, June 8, 1892, there was deposited to his account \$2,500; July 22, 1892, there was deposited to his account \$8,100.

August 1, 1892, he ordered brokers in New York to purchase \$10,000, par value, of railroad bonds, and sent to the brokers his check for \$9,000 on that account. These bonds were purchased, and Captain Carter subsequently paid to the brokers by his check the balance of \$193.75 of the purchase price. Similar deposits are traceable from time to time, and similar purchases of investment securities, commonly railroad bonds, were made by him through his brokers.

This process of deposit of moneys and the purchase of securities continued to the extent that in August, 1893, Captain Carter had in his control securities of the par value of \$70,000, and of the market value of \$86,000, producing an annual income of \$4,400. In August, 1894, his holdings had increased to \$130,000 par value—market value, \$152,000—with an annual income therefrom of \$8,200. In October, 1895, his holdings had increased to \$378,000 par value, the market value being \$463,000, producing an annual income of \$22,435. From October, 1895, to November, 1896, the amount of his holdings seemed to remain stationary. During that period there were only a few small payments made to the contractors at Savannah, probably not more than \$36,077.45. In the year 1896 there was deposited to Carter's credit over \$25,000, derived from interest coupons and dividends collected on securities which he had control of.

The possession of this large amount of securities, accumulated in so short a period, required from Captain Carter an explanation, and he attempted to give one. He testified that his father-in-law, Robert F. Wescott, after his marriage to his daughter, conceived for him a very strong personal attachment, and on account of his satisfactory management of a delicate family matter involving business transactions in connection with another daughter of Mr. Wescott, and her husband, Mr. Wescott had been led to repose great confidence in Captain Carter's business intelligence and ability, and that, therefore, he to a large extent turned over to him the management of his finances, including the purchase and sale of his securities. In proof of this, the accused produced two powers of attorney, executed by Mr. Wescott to him, giving to him unusually full authority to transact his

father-in-law's business, including the power to sign checks and buy and sell securities.

Captain Carter, during the absence of Mr. Wescott in Europe for a period of about fifteen months, had charge of Mr. Wescott's bank account in the Union Trust Company, and signed and drew checks against it, signing them "R. F. Wescott, per O. M. Carter, attorney." Out of this bank account was paid the purchase money of many of the securities bought by Captain Carter during this period of fifteen months, and to this account was credited during the same period many large sums of money deposited in cash, as well as coupons cut from securities. The checks upon this account, however, are not sufficient to account for the purchase money of the large number of securities bought by Captain Carter during that period, and he accounts for the remainder by saying that Mr. Wescott had left in his charge his safe-deposit box, in which he kept his securities; that in this box Mr. Wescott had left more than \$100,000 in United States gold certificates, and that from this fund he took from time to time cash with which to make up whatever balance over and above the drafts on the bank account was needed to pay for his purchase of securities.

He also alleges that Mr. Wescott not only from time to time actually presented to him large sums of money in cash, but that Mr. Wescott also made deposits of cash and checks to Captain Carter's individual bank account, all of which were in the nature of gifts. That Mr. Wescott reposed confidence in Captain Carter and that he had given him some money is testified to by a son of Mr. Wescott and another witness, but neither of them seems to have possessed any knowledge as to whether the amount thus donated was more or less.

Captain Carter testifies that most, if not all, of these securities traced to his possession belonged to Mr. Wescott; that when securities were purchased by him they were ordinarily purchased in his name, though sometimes specifically for account of Mr. Wescott, but were always deposited in Mr. Wescott's safe-deposit box, where he could have access to them.

One of the brokers who made some of the purchases testifies that from personal conversations with Mr. Wescott he recognized the agency of Captain Carter in these purchases, but this testimony goes only to a very small portion of the securities in question.

The above is substantially a statement of Captain Carter's account of his accession of wealth and of the possession of this large amount of securities. His bank account and the papers connected therewith prove that he collected and deposited to his own credit the interest coupons on securities to the amount of over \$300,000, par, down to March, 1897.

If this explanation given by Captain Carter is true, then it exonerates him. But, on the face of it, it is an unusual and improbable story. It was incumbent upon him for his own protection to sustain it by all attainable testimony. If Mr. Wescott, the alleged donor, had come upon the witness stand and corroborated the story it would probably have been sufficient, but he did not come. It is contended on behalf of Captain Carter that Wescott was, at the time of the trial, in Europe with a sick daughter and was in a nervous state himself, so that he naturally shrunk from the annoyance and trouble to which he would be subjected by coming home to testify in his son-in-law's behalf. The evidence as to the ill health of his daughter and his own condition of nervousness is very sparse and can not be deemed satisfactory. The letter which Mr. Wescott sent to Captain Carter, wherein he declined to appear before the board of inquiry in the fall of 1897, does not put his refusal upon either of these grounds, but rather upon the ground that his testimony was unimportant and could be supplied in other ways.

If it be true, as contended, that Mr. Wescott had such an extravagant affection and regard for his son-in-law as to induce him to confide to him so great a trust and to make him the donee of such large sums of money, then the natural suggestion would be that he would be interested intensely in the result of the trial in which the honor as well as the liberty of his son-in-law was involved. One would naturally think that a father-in-law so regardful of his son-

in-law's interests would be quick to rush to his defense and by his oath to add confirmation to the story which, if true, would exculpate him from these serious charges.

It is said that Captain Carter made great efforts to secure the attendance of Mr. Wescott as a witness, but there is no proof of it. There is no evidence that he wrote him or requested him in anywise to appear as a witness before the court-martial. The inference is that his testimony would not have benefited Captain Carter if he had appeared. Such is the irresistible conclusion, and, therefore, finding that the one witness in all the world who could have created conviction in the minds of the court as to the truth of this extraordinary story withholds himself, and that there is no satisfactory evidence that the defendant made any exertion to produce him, we must conclude that his testimony would not have been useful. It is also noteworthy that Wescott canceled the power of attorney which Carter held almost immediately after the accusation against Carter became public in the fall of 1897.

In the absence of the testimony of Mr. Wescott, we are forced to test the truthfulness of Captain Carter's story by an analysis of his dealings with the money and affairs of his father-in-law as they appear in the accounts and other exhibits in the case. It should be borne in mind that Carter's wife died in 1892.

Instead of showing that Captain Carter helped himself bounteously to the accumulated wealth of his father-in-law, this analysis shows that in all transactions where Captain Carter handled money which admittedly belonged to Mr. Wescott, he dealt with him on the basis of strict accountability to the last penny for everything he received belonging specifically to Mr. Wescott. In the account which he kept in the Union Trust Company, in the name of "R. F. Wescott, per O. M. Carter, attorney," he made a separation on his check book of those moneys which belonged to Mr. Wescott and those moneys which belonged to himself individually. He did not admit this in his testimony, but an analysis of the checks and accounts shows conclusively that those sums which he set down as belonging to "C" belonged to him, Captain Carter, and not to Wescott, as he pretended,

and that those sums which he set down as belonging to "W" belonged individually to Mr. Wescott and comprised the whole of Wescott's funds involved in that account, and on the termination of that account Carter deposited his individual check from his own bank account to make good the exact sum of \$144.84 of the funds of Mr. Wescott which he had used out of Mr. Wescott's account for his own purpose. The funds of Carter were very largely in excess of those of Wescott in this same account during all the time Carter kept it.

It further appears from correspondence between Captain Carter and Mr. Wescott as to proposed enterprises, such as the construction of houses at Orange, N. J., that they were dealing upon a strict business basis, just as strangers might do.

As to several of the sums, which the evidence shows were deposited in the bank account of Captain Carter by Mr. Wescott, it appears that almost contemporaneously therewith Captain Carter, by his check or otherwise, had put Mr. Wescott in funds to the amount of the specific deposit, the inference being that for some reason or other he preferred to furnish funds to Mr. Wescott, which Mr. Wescott might ostensibly deposit himself to the account of Captain Carter.

The testimony does not strike me as that of a man possessed of a clear idea of the truth and determined to tell it, but rather as a clever evasion of one who is endeavoring artificially to account for the possession of moneys derived from some other source.

There are other circumstances in the proofs which are suspicious. I have heretofore referred to the fact that many of the checks paid to these contractors were collected in cash over the counter at the subtreasury. No reason for this unusual course is suggested. It is to be further noted that Carter was present in New York on July 6, 1897, when the large checks were delivered to Gaynor on that date, and that he was on many other occasions, from 1892 to 1897, present in New York when payments were made to the contractors.

The following is a statement showing the deposits of currency made by Captain Carter simultaneously with the cash-

ing of checks given to the contractors in New York: 1893, January 3, Carter deposited \$3,550 in currency; February 10, he deposited \$5,850 in currency, and also paid for some bonds purchased by him; March 14, he deposited \$7,000 in currency; April 14, he deposited \$400 in currency, and also paid for some bonds purchased. 1894, March 5, he deposited \$2,400 in currency. March 5 to 7, 1895, he deposited \$20,000 in currency and a check for \$16,025; June 7 and 8, he bought bonds and paid for them; July 5 and 6, he deposited \$14,500 in currency. 1896, May 13, he deposited \$2,900 in currency. On each of these dates payments were made to the contractors by checks, which were either deposited or cashed in New York City.

Carter's statement of the gold certificates contained in Mr. Wescott's safe-deposit box, to the amount of over \$100,000, is such an extraordinary story, and so inconsistent with the methods of a business man, such as Mr. Wescott is testified to be, that it staggers credulity. If that money was there in a box to which Captain Carter had access, it is more probable that he put it there, using this means to withhold temporarily from his own bank account large sums which he had received from other sources. Such a device as that would be entirely consistent with the theory of fraud and concealment which is maintained by the prosecution. Captain Carter is admittedly a shrewd and clever man, and it is apparent from an examination of these accounts that he has resorted to various devices to cover up his tracks and conceal the true character of his transactions. Whether this was one of them or not, or whether the whole story is a fabrication, can not be determined; but in view of all the evidence, considering the improbability of his story, the failure to produce corroborative proof, which was within his reach, the long-continued possession of the large amounts of securities which he admittedly purchased, and the collection and appropriation by himself of the interest coupons thereon, with various other considerations which tend to discredit the truth of his explanation, the conclusion is forced upon the mind that Captain Carter, during these years from 1892 to 1897, had enriched himself to a large degree in some manner not accounted for by his own testimony; and the irresistible

conclusion, therefore, is that the true explanation of this rapid accession of wealth is one that he could not safely make, and that it is to be accounted for only by accepting the theory that he participated in the fraudulent proceeds of the contracts under his charge.

I am, therefore, led to the conclusion that the court-martial was justified in its finding of guilty upon the charges and specifications relating to these contracts of September, 1896, and that the finding and sentence of the court with respect thereto should be approved.

Very respectfully,

JOHN W. GRIGGS.

The PRESIDENT.

CHINESE—CERTIFICATES.

Certain Chinese subjects, who were bona fide merchants, were refused admission into the United States on the ground that the nature and character of their business plainly, specified in the Chinese portion of the certificates issued by the representative of the Chinese government, were not stated in the English translation of the certificates accompanying the same. *Held*, the collector was justified in refusing permission to land.

Applicants for admission to the United States should comply strictly with the requirements of the act of 1884 with reference to the form and contents of entrance certificates.

DEPARTMENT OF JUSTICE,

October 12, 1899.

SIR: Acknowledging the receipt of your communication of October 9, with its accompanying papers, in relation to the case of a Chinese person named Yee Ah Lum, I have the honor to state that, although somewhat contrary to the necessary rule of this Department (20 Opin., 711; 21 Opin., 220), I shall assume that the statement of facts contained in the note of the Chinese minister, dated October 2 and addressed to the Secretary of State, has been in effect adopted by you, at least so far as given below.

From this statement it appears that Yee Ah Lum and some thirty other merchants, all subjects of China, are detained at the port of San Francisco and refused admission into the United States by the collector of customs at that

port, on the ground that the nature and character of their business, plainly specified in the Chinese portion of the certificates issued by the only authorized representative of the Chinese Government and duly viséd by the United States consular officer, were not stated in an English translation of the certificates accompanying the same, although it appears that the applicants are *bona fide* merchants and did everything in their power to establish their character as such and to comply with the provisions of the law; the form of statement of your own letter being that the application was refused for the reason "that the certificate submitted by the applicant was not in the form and did not contain the information explicitly prescribed by the statute."

It further appears that upon petition for rehearing addressed to you the subject was referred upon two occasions to the Solicitor of the Treasury, whose opinion sustained the collector, and this view was approved by the Treasury Department. The question is now referred to me by you, in consideration of a request from the Chinese minister, through the Secretary of State, for my opinion as to the right of the Chinese person named, upon the facts stated, to land in this country.

Section 6 of the act of July 5, 1884 (1 Supp. Rev. Stat., 459), provides that the certificate which every Chinese person other than a laborer, who may be entitled to come within the United States, must produce, shall be in the English language, and shall show certain facts and circumstances relating to the applicant's identity and character, and in relation to a merchant shall state the nature, character, and estimated value of the business carried on by him prior to and at the time of his application. The treaty between the United States and the Empire of China, dated December 8, 1894 (28 Stat., 1210), does not vary the foregoing requirements of the law, except by permitting the certificate to be either that of applicant's own Government or of the Government where he last resided, because the language is (Article III) that "the provisions of this convention shall not affect the *right at present enjoyed* of Chinese subjects, being * * * merchants, of coming to the United States and residing therein."

The character and purpose of the Chinese exclusion legislation demand that the statutory provisions upon which the right of entry is conditioned should be strictly obeyed and construed. This has been the ruling of the courts. (*In re Ah Kee*, 21 Fed. Rep., 701; *In re Wo Tai Li*, 48 Fed. Rep., 668; *Wan Shing v. United States*, 140 U. S., 424.) The act of 1884 does not contravene our treaty obligations, because it was an amendment of the previous act of May 6, 1882, which was entitled "An act to execute certain treaty stipulations relating to Chinese." The treaty in force at that time was the treaty of November 17, 1880 (22 Stat., 826); but, as we have seen, the subsequent treaty did not change the law in reference to the present question. In short, it has never been considered that the act of 1884, in requiring a certain form and contents of the entrance certificates, violated any of our treaty obligations, and the uniform rule of the Treasury Department and the opinions of this Department show the view that the act should be strictly complied with by applicants for admission. (21 Opin., 6; 22 id., 72; id., 130.) As to the suggestion which appears *aliunde* that the Treasury has heretofore customarily accepted translations of certificates, I am not advised by your letter that such is the fact. Therefore, even if the strict letter of the statute, namely, that the certificate shall be in the English language, might properly be waived, as to which there is grave doubt in view of the plain and positive language, I am unable to see how a translation (which shows failure in other respects to conform to the requirements of the act, namely, in that the nature and character of the merchant's business are not stated therein) can be viewed as fulfilling the demand of the law. The argument on behalf of the applicant is substantially: First, that notwithstanding the language of the statute, the certificate may be in the Chinese language and a translation be accepted for the original; and second, that this translation, omitting a vital part of the certificate, may nevertheless incorporate the original and rely upon it for the omitted portion. I can not agree with this argument, and I am therefore of the opinion that Yee Ah Lum is not entitled to land in this country.

It seems that the hardship involved in this case, and re-

sulting from what is called a slight omission, as to which the applicant is innocent, and for which, perhaps, a transcribing official at the American consulate in question is responsible, is emphasized and brought into relief by the statements made and the papers submitted. Whether you in your administrative discretion may recognize this hardship and the merit of the applicants by taking a proper bond for their departure and, perhaps, placing them under surveillance pending the return of their certificates to China for completion and correction, is a subject with which it is not proper for me to deal.

I return the correspondence on the subject, as you request.

Very respectfully,

HENRY M. HOYT,
Acting Attorney-General.

THE SECRETARY OF THE TREASURY.

BONDS—DISBURSING OFFICERS.

The five years' limitation within which suits may be brought upon the official bonds of disbursing officers begins to run from the time the accounting officers of the Treasury make the statement of the account showing an indebtedness to the United States, as provided by section 2 of the act of August 8, 1888.

DEPARTMENT OF JUSTICE,
October 21, 1899.

SIR: I have the honor to acknowledge the receipt of your note of October 6, 1899, in which you request my opinion as to the proper construction of section 2 of the act of August 8, 1888 (25 Stat., 387), as to when the five years' limitation in that section for suits upon the official bonds of disbursing officers begins to run.

The first section of this act provides for notice to the obligors of the official bonds of disbursing officers and officers chargeable with public funds, and directs that "whenever any deficiency shall be discovered in the accounts of any official of the United States, or any officer disbursing or chargeable with public money, it shall be the duty of the accounting officers making such discovery to at once

notify the head of the Department having control over the affairs of such officer of the nature and amount of such deficiency, and it shall be the immediate duty of said head of Department to at once notify all obligors upon the bond or bonds of such official of the nature of such deficiency and the amount thereof."

Section 2 provides "*that if upon the statement of the account of any official of the United States, or of any officer disbursing or chargeable with public money by the accounting officer of the Treasury, it shall thereby appear that he is indebted to the United States, and suit therefor shall not be instituted within five years after such statement of said account, the sureties on the bond shall not be liable for such indebtedness.*"

Obviously, the five years within which suit must be brought under this section begins to run from the time of making such "statement of the account * * * by the accounting officer of the Treasury," showing an indebtedness to the United States, for if "suit therefor shall not be instituted within five years *after such statement of said account* the sureties on the bond shall not be liable for such indebtedness."

The statute is absolute in its discharge of the sureties if suit on the bond be not instituted "within five years after such statement of said account" by the accounting officer of the Treasury. And it makes no exception in case the accounting officer does not make such statement as early as he should, or when a deficiency is discovered by him.

And yet, a very important and more difficult question is that suggested by your statement of the practice in your Department, viz, in substance, that where in the account of a disbursing officer there appears, *prima facie*, a deficiency which may or may not prove to be real, such items are suspended for further evidence, and later a final statement is made showing the true state of the account. And the question is whether upon the discovery by the accounting officer of an *apparent* deficiency he should notify the head of the Department, as provided in section 1 of that act. That section provides that "whenever any deficiency shall be discovered," etc., the accounting officer shall notify the head of

the Department. Does this mean a final and certain discovery, or does it mean that whenever from the statement of the account of the disbursing officer it appears, *prima facie*, that there is a deficiency, he shall notify the head of the Department? Or, if neither of these, then at what time should he give such notice?

Taking the whole statute together, with its obvious intent and purpose, I do not think it was intended that the accounting officer should delay this notice until it has become certain that there is a deficiency; nor, on the other hand, do I think he should always report a deficiency whenever from the account of a disbursing officer it may appear, *prima facie*, that there is one. This may be from insufficient vouchers or evidence, or from clerical error or omission, or in one or more of various ways not inconsistent with a proper disbursement of the moneys in his hands. But I think that whenever in the exercise of a sound judgment, and after a reasonable time allowed for explanation and correction, it appears to the accounting officer that there is a probable deficiency, he should notify the head of the Department, as provided in section 1 of the act.

But, as before said, whether the accounting officer makes the statement showing an indebtedness to the United States as early as he should, or does not, I am of opinion that the limitation fixed by section 2 of that act begins to run only from the time that the accounting officer of the Treasury makes the statement of account showing an indebtedness to the United States, as provided in that section.

Respectfully,

JOHN W. GRIGGS.

The SECRETARY OF THE TREASURY.

FREE-DELIVERY OFFICES—CIVIL SERVICE.

When free delivery is discontinued at a post-office, such office ceases to be under the civil-service rules.

Free delivery offices as a class, and not offices formerly free delivery offices, were intended to be within Postal Rule I, and the present Rule III.

DEPARTMENT OF JUSTICE,

October 23, 1899.

SIR: I have your letter of the 9th instant, in which you say:

"I have the honor to request a ruling on the following question:

"When free delivery is discontinued at a post-office, does the post-office cease to be a classified office, or is it still classified under civil-service rules? In the event of a vacancy in the clerical force after the discontinuance of free delivery, would such vacancy have to be filled by a selection from the eligible register upon certification from the Civil Service Commission?"

"On the 5th of January, 1893, the President amended postal rule 1 of the civil-service rules so as to include in the classified postal service all free-delivery post-offices. The amendment to the rule reads as follows:

"The classification of the postal service, made by the Postmaster-General, under section 6 of the act of January 16, 1883, is hereby extended to all free-delivery post-offices, and hereafter when any post-office becomes a free-delivery office the said classification of any then existing classification made by the Postmaster-General under said section and act shall apply thereto, and the Civil Service Commission shall provide examinations to test the fitness of persons to fill vacancies in all free-delivery post-offices, and these rules shall be enforced therein; but this shall not include any post-office made an experimental free-delivery office under the authority contained in the appropriation act of March 3, 1891. Every revision of the classification of any post-office under section 6 of the act of January 16, 1883, and every inclusion of a post-office within the classified postal service, shall be reported to the President."

"The law provides for the establishment of free delivery in cities having a population of 10,000 or more, or at any post-office which produces a gross revenue for the preceding fiscal year of not less than \$10,000, and gives the Postmaster-General authority to discontinue free delivery within his discretion."

It is clear that, according to the *language* of the rule, the Civil Service Commission were to examine persons only in cases of *vacancies in free-delivery offices*; also, that, according to the *language*, no civil-service rule was to be enforced except *in cases arising in free-delivery offices*. As, obviously, the first part of this amendment intended to extend classification only with a view to the examinations and to the enforcement of the civil-service rules, it seems to follow that, according to the *natural meaning* thereof, the whole first sentence is intended to regulate present and future *free-delivery* post-offices, and *no other*.

If so, we must have some strong reason for giving a different meaning to it, for the law insists on giving it its natural meaning, in the absence of absurdity or unreasonableness or the like.

No such absurdity is apparent; and it seems not unreasonable, whether wise or not, for the President to have intended, what his words naturally mean, that the *set* of post-offices known as free-delivery offices—a *set* whose membership was liable to diminution and increase under the statutes (act of January 3, 1887)—should have the civil-service rules extended to the force of employees therein.

It would, in fact, be anomalous and strange to see those rules enforced in post-offices for the sole reason that they *had been* free-delivery offices, and not enforced in any other offices identical in character with them, as they actually *are*.

Your communication takes no note of the fact that this postal rule No. 1 has been altered by the President; but I am not of the opinion that the alteration was intended to change the general sense of it so far as it relates to the matter now under consideration.

On the contrary, the sense I am attributing to that rule seems to be again, and in a different form, expressed by the opening words of it: "The post-office service shall include the officers and employees *in any free-delivery* post-office who have been, or may hereafter be, classified under the civil-service act."

Certainly this would not include employees in any office which then (1896) *had been*, but was no longer, a free-deliv-

ery office, and if offices which *have been* are excluded, we may well suppose the same intent as to offices which *shall have been*. The natural sense of the words of the new rule confines it and confines "the postal service" to any present and future free-delivery office. At least to lawyers familiar with the interpretation of wills it must seem the natural meaning of the provision, that it concerns only the free-delivery post-offices as a well-known changeable "class."

If the intent we attribute is thus reiterated in a *new* form by the new rule, it is needless to consider whether or not, in the interim, those charged with applying the rule had interpreted it differently, a fact which would otherwise (provided the interpretation were considered a doubtful question) be worthy of attention.

The rule being self-acting, so as to take in any new free-delivery post-office, from the mere fact of its existing, so, by operation of law, or rather, so to speak, by operation of *fact*, an office ceasing to be a free-delivery office may well have been intended to go out again.

Neither do I think that paragraph 7 of Rule III—"All officers and employees who have heretofore been classified under the civil-service act shall be considered as still classified and subject to the provisions of these rules"—affects our question.

That concerns employees classified at the date of promulgating that paragraph, since it says that they shall be considered as "still" classified. After (or notwithstanding) the promulgation of a set of new rules, they were to be considered as remaining classified and subject, etc.

It does not say that they shall be considered as forever so, but still, that is, be considered as continuing so, for how long is not stated. If I am right in supposing that under the previous rule the employees of a free-delivery office would and did, if any case arose, cease to be under the civil-service rules *upon the office ceasing to be such free-delivery office*, I do not think the language of paragraph 7 inconsistent with the perpetuation of such a rule or intended to have any bearing upon it.

It seems to me that the more logical, consistent, sensible view of the matter is that free-delivery offices as a class, and

not offices formerly free-delivery offices, were intended to be within the postal Rule I and the present Rule III.

Respectfully,

JAS. E. BOYD,
Acting Attorney-General.

The POSTMASTER-GENERAL.

LICENSES—PHILIPPINE ISLANDS.

A patent or license granted July 11, 1898, to a Spaniard for the manufacture of hemp by steam, etc., in the Philippine Islands for the term of five years is protected by article 13 of the treaty with Spain, if on that date it would, in ordinary times, have been good under Spanish law, notwithstanding American law gives no identical rights.

The laws of Spain concerning industrial property were contemplated by the framers of article 13 in providing protection for Spanish rights.

The laws of Spain concerning industrial property explained.

DEPARTMENT OF JUSTICE,

November 11, 1899.

SIR: I have received your letter of the 17th ultimo, inclosing one from the Secretary of State, and asking my opinion upon the following:

“A Spanish gentleman by the name of Bernabe de Codes, has a ‘patent’ (license or concession) for five years for the manufacture of hemp by steam, to make cords, etc., in the Philippine Islands.

“The said Mr. Codes has complied with all the requirements of the Spanish laws of July 30, 1878, and May 14, 1880, by which his patent is extensive to the Spanish provinces of Ultramar.

“The said patent for five years was granted to Mr. Codes by the Spanish Government on July 11, 1898. This gentleman desires to know if the decree of the Spanish authorities will hold good in the Philippines under the present régime.”

The law of Spain concerning industrial property (*propiedad industrial*) of July 30, 1878, seems to be still in force. In that law we find:

“ART. 1. Every Spaniard or foreigner who undertakes to establish in the Spanish dominions an industry new in the

same shall have the right of exclusive carrying on (explo-tacion) of his industry during a certain number of years, under the rules and conditions prescribed in this law.

“ART. 2. The right spoken of in the preceding article is acquired by obtaining from the Government a patent of invention.

“ART. 3. These may be objects of patents:

“Machines, apparatus, instruments, mechanical or chemical processes or operations, which in whole or in part are of the applicant's own invention, or new, or which, without these characteristics, are not found established or practiced in the same mode and form in the Spanish dominions.

“New industrial products or results, obtained by new or known means, provided that their carrying on (explotacion) goes to establish a branch of industry in the country.

“ART. 4. Patents concerning the products or results mentioned in the second paragraph of the preceding article shall not prevent other patents concerning the objects mentioned in the first paragraph directed to obtain the same products or results.

“ART. 5. The word ‘new’ in article 3 means that which is not known nor found established or practiced in Spanish or foreign dominions.

“ART. 6. The right which the patent of invention confers, or that which is derived from the application to obtain it, may be transferred (transmitirse) in whole or in part by any of the means established by our laws in regard to individual property.

“ART. 8. Every patent shall be considered as conceded, not alone for the Peninsula and adjacent islands, but for the provinces beyond the sea.

“ART. 9. These can not be objects of patents:

“1. The result or product of the machines, apparatus, instruments, processes, or operations mentioned in paragraph 1 of article 3, if they are not embraced in paragraph 2 of the same article.

“2. The use of natural products.

* * * * *

“4. Pharmaceutical or medical preparations of any kind.

“ART. 11. Patents for inventions are to be given without

previous examination as to novelty and utility; they are not to be considered, therefore, in any case as a declaration of the novelty or utility of their objects, etc.

"ART. 12. The duration of patents of invention shall be twenty years, with no extension (improrrogables), if they are for objects of the applicant's invention and new."

The duration of patents for whatever is not of the applicant's own invention, or, even if it is, is not new, shall be only five years, with no extension.

The article, nevertheless, does allow an extension, but only in case of an invention by the applicant.

It is clear from this law and your communication that Mr. Codes's patent is for something we should not call a patentable invention and should not issue a patent to protect. At the same time it is for something which a slight extension of our own policy concerning such things might naturally embrace. It gives a monopoly of a line of industry, new to Spain, if not to the world, to one who introduces it into Spain.

Article 13 of our recent treaty with Spain says:

"The rights of property secured by copyrights and patents acquired by Spaniards in the island of Cuba, and in Porto Rico, the Philippines, and other ceded territory, at the time of the exchange of the ratifications of this treaty, shall continue to be respected."

This article is limited as to Cuba to the time of the American occupation.

In the Spanish copy of the treaty, the article, instead of "rights of property secured by copyrights and patents acquired by Spaniards," says, "the rights of property, literary, artistic, and industrial, acquired by Spaniards."

Without undertaking to pass upon the questions, which your communication does not enable me to decide, whether Mr. Codes complied with Spanish law and regulations and had a business patentable under them, it seems to me that if on July 11, 1898, he would, under ordinary circumstances, have become entitled as a patentee, this article 13 of the treaty was intended to and does protect his rights, notwithstanding the unusual events preceding and following that date.

The treaty in Spanish, like the Spanish law of 1878, speaks of "industrial property." It concerns only Spanish rights acquired under Spanish laws; and the framers of it must be presumed to have known something of those rights and laws of which they were treating and to have had in mind such laws as that of July 30, 1878, corresponding to our laws relating to patents. In English, the words "industrial property" become "patents." I think it reasonable to infer from these things that the article was drawn up with a view to embracing property recognized by the Spanish laws which correspond with our patent laws, even if that property was not identical with that recognized by our laws.

I see nothing in the nature of the right claimed, in that it might be objected to as a monopoly, to cause a different interpretation of the treaty or to prevent that article of the treaty from being constitutional and obligatory.

Respectfully,

JOHN W. GRIGGS.

The SECRETARY OF WAR.

NAVY—BOATSWAINS, GUNNERS, AND MACHINISTS.

Neither boatswains, gunners, nor warrant machinists are officers of the line of the Navy within the meaning of the Revised Statutes, the acts of August 5, 1882, and March 3, 1899.

Boatswains and gunners are officers in the line of command, and there is nothing in the classification in the act of 1882 to indicate an intent to make unlawful the exercise of command by them.

These officers are not improperly classed in the Regulations of the Navy as officers of the line, and may therefore be given the star upon their uniforms.

Warrant machinists created by the naval personnel act were not placed in the list of line officers of the Navy.

Warrant machinists are not entitled to command.

DEPARTMENT OF JUSTICE,

November 15, 1899.

SIR: I have received your letter asking my opinion as to the following question:

"Whether under the provisions of the law boatswains and gunners are properly classified by the Navy Regulations (article 16) as line officers; and if so, whether warrant machinists should, under the law, be so classified."

Accompanying your letter are copies of communications discussing whether boatswains, gunners, and warrant machinists should be placed over commissioned staff officers and whether they should wear the star on the sleeve, which is stated to be appropriate for line officers only.

Your letter is also accompanied by printed uniform regulations giving the star to mates, gunners, and warrant machinists and addenda to the same, striking out the words "and warrant machinists."

In 1862 Congress passed an act purporting to establish the grade of line officers in the Navy. Prior to that time there is little or nothing in the statutes about the line of the Navy.

In that statute, without explaining which of the various meanings of the word "line" Congress had in mind, it left no doubt as to the officers it intended to embrace among line officers of the Navy, for it mentioned them all, beginning with the admirals and extending through captains, commanders, lieutenants, masters, and ensigns to midshipmen. This specification was practically repeated in the acts of July, 1866, in the Revised Statutes of 1873, in an act of August 5, 1882, and in the recent naval personnel act. It omits boatswains, gunners, etc.

It seems to be clear that, within the meaning of the Revised Statutes and subsequent laws, line officers of the Navy are the officers specified in this way and that no others are such officers of the line.

It follows that none of the officers referred to by you are, within the meaning of those laws, officers of the line.

It is also obvious that all officers specified by Congress as line officers were thereby distinguished from all officers not specified, whether those officers were staff officers properly so called or officers belonging to special corps, such as the pay corps, the medical corps, and the like, warrant officers or petty officers.

It does not follow from all this, however, that Congress intended to deprive boatswains and gunners of any position they may have acquired in the Navy.

From the earliest times the officers of the Navy have been divided into commission officers, warrant officers, and petty

officers, the difference being rather a difference in the mode of appointment or designation than one growing out of the function to be performed.

The commission officers were those holding commissions from the President like the commissions of other officers of the United States; warrant officers had no such commissions, but only warrants given by the President or Navy Department; and petty officers were rated or designated by the commanders of their respective vessels from among the enlisted men on board.

From the earliest times boatswains, gunners, carpenters, and sailmakers were among the warrant officers, but they were by no means all of them, for midshipmen, mates, and various others were warrant officers.

The earliest Naval Regulations I find throwing any light upon this subject are those of 1818, but in the corresponding British orders of 1806 I find the following:

“The order in which officers shall take precedence *and command* in the ship to which they belong is as follows: Captain or commander, lieutenant, sublieutenant, master, second master, gunner, boatswain, master’s mate, midshipmen.”

I find that gunners, boatswains, and carpenters are therein mentioned as warrant officers, and the sailmakers directed to report to the boatswains.

In our Regulations of 1818 I find, under the head of rank and command:

“Paragraph 4. The order in which officers shall take precedence *and command* in the ship to which they belong is as follows:

“Captain or commander, lieutenant (agreeably to date or number of command), master’s mate, boatswain, gunner, carpenter.”

The sailmaker was, as in the British service, to report the condition of the sails to the boatswain. He has at the present day ceased for obvious reasons to have importance in the Navy.

It thus appears that boatswains and gunners were in 1818 classed by the regulations as in *the line of command*, and that they had probably been long before that in such line of command.

The Regulations of 1818 are, in a note to the Rules of the Navy Department of 1832, spoken of as then in full force, except as expressly amended, and how little they were amended in any way affecting boatswains and gunners is clear from the Regulations of 1841, in which, under the head of *rank and command*, I find the following:

“CHAPTER I.

“ARTICLE 1. Sea officers of the Navy of the United States shall take rank *and command* in the following order:

Commission officers.	{	1. Admirals.	{	Flag officers when au- thorized by law.
		2. Vice-admirals.		
		3. Rear-admirals.		
		4. Captains.		
		5. Commanders.		
		6. Lieutenants.		
Warrant officers.	{	7. Masters.		
		8. Second masters.		
		9. Passed midshipmen.		
		10. Master's mate, if warranted as such.		
		11. Boatswains.		
		12. Gunners.		
		13. Midshipmen.		
		14. Carpenters.		
		15. Sailmakers.		

“ARTICLE 2. The above-named commission officers shall take precedence and command in their respective ranks according to the priority of the dates of their commissions; second masters and passed midshipmen according to the number or date of certificates of their examination or of their warrants as such, and the other warrant officers according to their date.

“ARTICLE 3. No officer of any rank below that of a second master shall be entitled to exercise any authority or command over any other officer of the same or inferior rank, excepting when employed on detached service when there is no superior officer present, or when he shall have succeeded to the command of a vessel or navy-yard by the death or absence of all superior officers, or when he shall have charge of a watch, or when it shall be necessary for the suppression of a riot, quarrel, or other manifest impropriety of conduct, or when duly appointed to act in some higher grade.”

On November 11, 1851, the Department promulgated regulations, orders, and decisions which seem to have made no changes so far as our present inquiry is concerned.

The Regulations of 1865 coming, be it observed, after the act of 1862, specifying line officers of the Navy, contains the following:

“Surgeons, paymasters, naval constructors, chief engineers, chaplains, passed assistant surgeons, secretaries, assistant surgeons, assistant naval constructors, assistant paymasters, first assistant engineers, second assistant engineers, third assistant engineers, clerks, carpenters, and sailmakers are to be regarded as staff officers, and all other officers of the service as line officers.”

This expression “all other” included, of course, boatswains and gunners among line officers.

The same regulations provided that petty officers of the Navy should be divided into two classes—petty officers of the line and petty officers of the staff—and said: “The class of petty officers of the line and the order of rank and of *succession to command* shall be as follows: First, boatswains’ mates,” etc.

In the Regulations of 1869 the provisions just quoted as to petty officers are preserved, but those regulations do not clearly place boatswains and gunners in either the line or the staff or elsewhere than among warrant officers. Articles 897, 898, 899, concerning funeral honors to staff, warrant, and petty officers would seem, however, to indicate that, if not in the line, warrant and petty officers were not supposed to be for that reason all in the staff, since separate provisions for funeral honors are made for the three sets of officers, staff, warrant, and petty.

The Regulations of 1870, under the head of Rank and Command, contain the following:

“Paragraph 630. The line officers of the Navy are classed by law as follows:

Admiral.	Commander.
Vice-admiral.	Lieutenant-commander.
Rear-admiral.	Lieutenant.
Commodore.	Master.
Captain.	Ensign.
	Midshipman.

"631. The usage of the naval service considers also that mates, boatswains, and gunners are officers of the line.

"632. Military command of, or in, vessels of war in the United States is exercised by the above-designated officers, in the order in which they are named.

"633. Medical, pay, engineer officers, and others not of the line and not classed by law, are placed in the Annual Navy Register as follows: Surgeons, etc.

"634. Military command of, or in, a vessel of war of the United States is not exercised by the above-designated officers.

"647. The class of petty officers, and the order of rank, and of *succession to command*, shall be as follows: Boatswain's mates, etc."

The Regulations of 1876 resemble those of 1869.

The United States Naval Uniform Regulations issued July 1, 1885, provide that "line officers, including mates, boatswains, and gunners, will wear a star," etc.

The Regulations of 1893 provide:

"ARTICLE 16. The officers of the line are as follows and they shall take rank and *exercise military command* in the order mentioned:

Rear-admiral.	Ensign.
Commander.	Naval cadet.
Captain-commander.	Boatswain.
Lieutenant-commander.	Gunner."
Lieutenant-commander (junior grade).	

Article 18 of these Regulations provides: "Officers of the line only can exercise military command."

From this review of the Regulations, and from such information as I have obtained, it would seem that boatswains and gunners have been in the line of command, as a matter of fact, for a century. Both of them are officers whose functions and business are ancient and are involved in the customs of the British and American navies.

As a navy is an organic growth its antecedents and customs should not be ignored in an inquiry such as the present.

If now we turn to the statutes of Congress passed at a

time when statutes did not commonly regulate all the minor details of the executive branch, passed, that is, in the formative period of our present Navy, we find that it was common to authorize a number of vessels and then authorize the President to officer and man them as he might see fit. Details in the business of the Navy, manifestly, had to be regulated in some way long before Congress put into shape its present system of statutes on the subject.

We find, also, in the first half century of the history of the Navy a number of statutory references to the Regulations and to the warrant officers, and express mentions to boatswains, gunners, sailmakers, and carpenters, but in none of these instances, nor in any other, have I been able to find that the duties assigned to the boatswain and gunner, or the command allowed to be exercised by them, met with Congressional disapproval.

From all that has been said I think we may conclude that treating those officers as in the line of command was not without lawful authority before 1862. The act of that year in speaking of "the line" evidently does not mean "the line of command," and I see nothing in its classification to indicate an intent to make unlawful the exercise of command by boatswains and gunners.

These things being so I think those officers are not improperly classed in the regulations as officers of the line, and that they can properly be given the star upon their uniforms.

The machinist has existed in the Navy for some time, of course, and yet for no great period. He has been a rated or petty officer. (Art. 794, Regulations of 1893.) The personnel act of this year, creating the office of warrant machinist, shows plainly that Congress did not intend to place the machinists in *its own list of line officers*, for it repeated that list in section 7 and omitted them.

They had previously been connected with the engineer corps or its business, a staff or special corps no part of which had been exercising military command.

The personnel bill has not been regarded as *ipso facto* transferring all the officers of that corps to the *line of command*. (See General Order 524.)

As these machinists do not appear to have previously exercised military command, I think that, before they are to be held entitled to command, and others, including senior officers, held to be under obligations to obey them, something positive to that effect should be produced from the personnel act or from the general nature of their duties or elsewhere. The presumption is the other way, and I find nothing to overcome it.

Respectfully,

JOHN W. GRIGGS.

The SECRETARY OF THE NAVY.

HAWAII—PUBLIC LANDS.

Congress having failed to legislate on the subject of public lands for the Hawaiian Islands, the government of Hawaii is not reinvested with its former power of their disposition.

The Hawaiian Republic, as a separate and sovereign power, ceased to exist when the resolution of annexation took effect, and it exists as an organized government only for the purpose of municipal legislation and for such special purposes as were expressed in the resolution, the sale and disposition of the public lands not being one of the latter class.

The term "municipal legislation" is limited to that class of laws that relates solely to the internal affairs of the country and the relations of the people to each other.

By the resolution of annexation the public property of Hawaii, including the lands, became vested in the United States, and only by their authority or direction can those lands be disposed of.

All interest of the Republic of Hawaii in public lands at the time the resolution of annexation took effect were thereby transferred to the United States, and thenceforth the officials of Hawaii were without power to convey by grant or cession the legal or equitable title of the United States.

The resolution of annexation took effect as of the date of its approval, to wit, July 7, 1898, with respect to public lands and not August 12, 1898, the date on which the ceremonies took place formally transferring possession.

The Hawaiian government has no power to convey or confirm title to public lands where conditional sales or entries were made prior to the resolution of annexation, and the conditions entitling such persons or entrymen to a grant have been subsequently performed.

DEPARTMENT OF JUSTICE,

November 21, 1899.

SIR: By an Executive order bearing date of September 11, 1899, you directed "that all proceedings taken or pending for the sale or disposition of public lands in the Hawaiian Islands shall be discontinued; and that if any sales or agreements for sale of said public lands have been made since the adoption of the resolution of annexation the purchasers shall be notified that the same are null and void, and any consideration paid to the local authorities on account thereof shall be refunded."

This order was issued in conformity to an opinion rendered to you by myself on September 9, 1899, wherein the power of the local government of Hawaii to make sale and disposition of the public lands in the Hawaiian Islands was considered, and the conclusion was reached that upon the approval of the resolution of annexation those lands became the property of the United States and could be disposed of only in accordance with the laws of Congress.

I am now put in possession by you of a communication, with accompanying documents, from Hon. Alfred S. Hartwell, special agent of the government of the Republic of Hawaii in Washington, wherein he requests, on behalf of President Dole, a reconsideration of your Executive order of September 11, 1899. You have requested me to examine and hear for you the questions involved and the views of the representatives of the local government of Hawaii, and to advise you thereon.

There are several grounds of objections to the legality and propriety of the order of September 11, 1899, which are raised on behalf of President Dole. I will state them and consider them in the order in which they are offered.

In the first place, it is contended that the provisions of the resolution of annexation, taken in connection with the failure of Congress up to the present time to pass any special laws concerning the management and disposition of the public lands of Hawaii, show that it was intended by the two governments that, pending Congressional legislation, the existing government of the Hawaiian Islands should continue to administer its public land laws. This contention is

based principally upon that clause of the resolution which declares that the "municipal legislation of the Hawaiian Islands not enacted for the fulfillment of the treaties so extinguished, and not inconsistent with this joint resolution, nor contrary to the Constitution of the United States, nor to any existing treaty of the United States, shall remain in force until the Congress of the United States shall otherwise determine."

This contention was adversely disposed of by me in my opinion of September 9, 1899, an appropriate portion of which I here repeat:

"It is only necessary to refer to the language of the resolution and to the well-understood principles of public law which govern the subject of territory ceded by one Government to another to reach the easy conclusion that the public lands in the Hawaiian Islands, upon the approval of the joint resolution of cession, became the property of the United States, and could thereafter be disposed of only in accordance with such special laws as Congress might thereafter enact. The preamble of the resolution declares:

"Whereas the Government of the Republic of Hawaii having in due form signified its consent in the manner provided by its constitution to cede absolutely and without reserve to the United States of America all rights of sovereignty of whatsoever kind in and over the Hawaiian Islands and their dependencies, and also to cede and transfer to the United States the absolute fee and ownership of all public, Government, or Crown lands, public buildings or edifices, ports, harbors, military equipment, and all other public property of every kind and description belonging to the Government of the Hawaiian Islands, together with every right and appurtenance thereunto appertaining.'

"And the resolution following this preamble resolves:

"That said cession is accepted, ratified, and confirmed, and that the said Hawaiian Islands and their dependencies be, and they are hereby, annexed as a part of the territory of the United States and are subject to the sovereign dominion thereof, and that all and singular the property and rights hereinbefore mentioned are vested in the United States of America.'

“This language expressly recites the cession and transfer to the United States of the absolute fee and ownership of all public, Government, or Crown lands, and all other public property of every kind and description belonging to the Government of the Hawaiian Islands.

“The resolution of annexation further provides:

“The existing laws of the United States relative to public lands shall not apply to such lands in the Hawaiian Islands; but the Congress of the United States shall enact special laws for their management and disposition: *Provided*, That all revenue from or proceeds of the same, except as regards such part thereof as may be used or occupied for the civil, military, or naval purposes of the United States, or may be assigned for the use of the local government shall be used solely for the benefit of the inhabitants of the Hawaiian Islands for educational and other public purposes.’

“The effect of this clause is to subject the public lands in Hawaii to a special trust, limiting the revenue from or proceeds of the same to the uses of the inhabitants of the Hawaiian Islands for educational or other public purposes. This merely restricted the uses to which the proceeds of such lands could be put, but did not in anywise affect the previous provisions of this clause, which conferred upon Congress the sole and absolute authority to provide for the management and disposition of these lands. The effect of the language quoted is to vest in Congress the exclusive right, by special enactment, to provide for the disposition of public lands in Hawaii. Possibly such would have been the effect of the resolution even if this language had not been inserted. But the language having been expressly inserted there can be no doubt whatever but what the effect of the resolution is to deprive the local government of Hawaii of all authority to dispose of these lands in any manner whatever, except by virtue of special laws enacted by Congress. The fact that Congress has failed up to this time to legislate on the subject has not reinvested the Hawaiian government with its former power of disposition. That power ceased upon the cession. The lands then became the property of the United States and could

be disposed of only in accordance with the laws of Congress."

I referred in my opinion to the language of the Supreme Court of the United States in the case of *Harcourt v. Gailiard* (12 Wheaton, 523) as expressive of the general principle which governs and controls this subject.

I can not but think that the representative of the Hawaiian Government has failed to appreciate the fact that the Hawaiian Republic as a separate and sovereign power ceased to exist when the resolution of annexation took effect. It existed as an organized government only for purposes of municipal legislation within the well-accepted meaning of that phrase, and for such special purposes besides as were expressed in the resolution, the sale and disposition of the public lands not being one of the latter class.

In a case involving the question of a grant made by Spain after the date of a treaty ceding territory and prior to the ratification of the treaty, the Supreme Court of the United States, discussing the effect of the signature of treaty conventions and the date when they took effect and the power of the ceding country over public lands pending ratification, expressly limits the meaning of the term "municipal legislation" to that class of laws that relate solely to the international affairs of the country and the relations of the people to each other, and declares that the exercise of sovereignty by the ceding country ceases after the signature of the treaty "except for strictly municipal purposes, especially for granting lands." (*Davis v. The Police Jury of Concordia*, 9 Howard, 280-289.)

Similar language is commonly used in expressing the legal conditions in a country conquered by arms. It is commonly said that in such cases the municipal laws governing the people in their relations with each other remain in force, subject to the will of the conqueror, but that the power and authority of the former sovereign either to make laws, exercise dominion, or grant rights or privileges or make conveyance of public property are terminated.

The existing government of Hawaii very clearly, by the resolution of annexation, parted with all ownership of the public lands of Hawaii. Indeed, it is scarcely an adequate

expression of the fact to say that it parted with the ownership, because that government, as a sovereign power, was dissolved and ceased to exist. Its public property, including lands, became vested in the United States, and only by the authority or direction of the United States could those lands be disposed of. If there is any authority left in the officials exercising government in Hawaii to grant to purchasers and others good title to lands which by the resolution were conveyed to the United States, it must be by reason of some delegation in the nature of agency, and that delegation must be found in the resolution of annexation, because there has been no other legislation by Congress on this subject. But, as I have previously decided and as I have herein pointed out, no such authority is contained in the resolution, but the reasonable and natural construction of its language is opposed to such a contention. The case may be summed up by the statement that whatever right, title, interest, or property the Republic of Hawaii had in public lands at the time the resolution of annexation took effect were transferred thereby to the United States, and thenceforth the officials of the Hawaiian Republic were without any power whatever to convey by any kind of grant or concession the legal or equitable title of the United States.

Second. It is suggested that the Executive order of September 11, 1899, should be modified so as not to apply to sales or agreements for the sale of public lands made between the date of the approval of the resolution and the 12th day of August, 1898, which was the date on which the ceremonies took place at Honolulu evidencing the formal taking possession by the United States of the Hawaiian Islands. Exactly what these ceremonies were I am not informed, except that they comprised the lowering of the Hawaiian flag and the running up of the flag of the United States in the presence of the former diplomatic representative of the United States in Hawaii and of the officials of the Hawaiian Republic.

Our Supreme Court, speaking with reference to this particular subject of international jurisprudence and construction, has said:

“All treaties, as well those for cessions of territory as for

other purposes, are binding upon the contracting parties, unless when otherwise provided in them, from the day they are signed. The ratification of them relates back to the time of signing. (Vattel, B. 4, c. 2, sec. 22; Mart. Summary, B. 8, c. 7, sec. 5.)

“It is true that in a treaty for the cession of territory its national character continues, for all commercial purposes; but full sovereignty for the exercise of it does not pass to the nation to which it is transferred until actual delivery. But it is also true that the exercise of sovereignty by the ceding country ceases, except for strictly municipal purposes, especially for granting lands. And for the same reason in both cases, because, after the treaty if made, there is not in either the union of possession and the right to the territory which must concur to give *plenum dominium et utile*. To give that there must be the *jus in rem* and the *jus in re*, or what is called in the common law of England the *juris et seisinæ conjunctio*. ‘This general law of property applies to the right of territory no less than to other rights, and all writers upon the law of nations concur that the practice and conventional law of nations have been conformable to this principle’. (Puffendorf par Barbeyrac, lib. 4, c. 9, sec. 8, note 2.)

“(Davis v. The Police Jury of Concordia, 9 Howard, 289.)”

The reasons for this doctrine, as given by the courts, are that if the ceding power were to be permitted to make grants and concessions of land, privileges, and franchises between the date of the signature of the treaty and the day of ratification, the concessionary might be deprived of a very valuable portion of the estate which it had contracted to receive. So far does the doctrine go that it is declared, that before the signature of the treaty, but after negotiation has begun for cession of territory, grants of land can not be made in it without being subject to confirmation by the sovereign to whom transfer is to be made. It is too manifest to require anything more than statement that if a sovereign could exercise the power of alienation of the public domain after a treaty had been signed and before its ratification, he might change materially the relations which the people of the ceded territory had to each other, and

establish a different condition than that which had been contemplated when the agreement was definitely concluded. "The law of nations does not recognize in a nation ceding a territory the continuance of supreme power over it after the treaty has been signed, or any other exercise of sovereignty than that which is necessary for social order and for commercial purposes and to keep the cession in an unaltered value until a delivery of it has been made." (*Davis v. Police Jury of Concordia, supra.*)

I do not think that the difference in the method of cession employed in this case requires a different rule of interpretation from that which would have been employed if the cession had been by treaty. The reasons that are applicable in the one case are equally applicable in the other. The language of the resolution is in the present tense. It declares that "the said cession is accepted, ratified, and confirmed, and that the said Hawaiian Islands and their dependencies be, and they are hereby, annexed as a part of the territory of the United States and are subject to the sovereign dominion thereof, and that all and singular the property and rights hereinbefore mentioned are vested in the United States of America."

This resolution follows a preamble in which it is solemnly stated that the government of the Republic of Hawaii had, in due form, signified its consent, in the manner provided by its constitution, to cede absolutely and without reserve to the United States of America all rights of sovereignty, etc. If the ceremonies that were performed on the 12th of August, 1898, were necessary as evidencing the ratification of the agreement between the two governments, and if the government of Hawaii can be considered to have participated in those ceremonies, then, unquestionably, their action made the effect of the resolution relate back to the date of its adoption and required that it should be given effect in accordance with its language, which related to the date of its adoption rather than to the date of the subsequent ceremonies. Nothing is said in the resolution as to any formal delivery or any further solemnity for the purpose of transferring absolutely the title to the United States. The resolution assumes that the annexation was complete with the

adoption of the resolution by which the assent of the United States to the offer of the Republic of Hawaii was given.

I therefore advise you that in my opinion with respect to the public lands the resolution took effect as of the date of its approval, to wit, July 7, 1898.

Third. The special agent of the Hawaiian government refers to certain correspondence between Mr. Sewall, the special agent of the United States at Honolulu, and the Department of State at Washington as establishing a justification for the exercise of the power of sale by the government of Hawaii subsequently to the annexation. At the request of the Hawaiian government the following question was submitted to the Department of State on August 6, 1898:

"Should not President Dole continue to exercise land patents and deeds in the ordinary dealing with government lands under the Hawaiian land laws?"

To which it was answered by Mr. Sewall, in conformity with his instructions, as follows:

"Resolution provides that land laws of the United States shall not apply to public lands in Hawaii, and that municipal legislation of Hawaii generally shall remain in force."

The Hawaiian authorities regarded this answer as tantamount to a declaration of opinion on the part of the Department of State that they were authorized to make grants of public domain in the absence of any legislation by Congress to the contrary.

It will be observed that, taken by itself, this response to the question of the Hawaiian government does nothing more than recite two unquestioned provisions of the resolution, neither of which by itself, in my judgment, was pertinent to the question or decisive of it. It is impossible to say that the special agent of the State Department intended by this reply to answer the question in the affirmative, although it is perhaps natural to infer such an intention. But the question is one involving naked power—a power to dispose of the lands of the United States, which, under the Constitution, can only be disposed of in conformity to the will of Congress. It is not a question of the good faith of the Hawaiian officials, for that is unquestioned. A wrong infer-

ence as to the meaning of the answer forwarded by Mr. Sewall could not effectuate the exercise of an unauthorized power of sale, nor vest in a grantee title to lands which the Hawaiian government, under a careful consideration of the law, is decided to have been without power to convey.

Fourth. It is represented that there are large numbers of sales of public lands which were made by the Hawaiian government to carry out its own agreements concerning the same, made prior to August 12, 1898. I understand this class of cases to comprise those where conditional sales or entries were made by purchasers or entrymen prior to the resolution of annexation, and where the conditions entitling the purchaser or entryman to a grant have been subsequently complied with.

What I have said as to the cessation of the power of the Hawaiian government to make original sales and conveyances subsequently to the cession applies, from a legal point of view, to this class of cases. The difficulty is that the power of the Hawaiian government, as a sovereign possessed of sovereign right to make conveyances and grants of land, ceased, and all its powers and sovereign rights in this respect were transferred to the United States. This was the same with reference to lands under conditional agreements or under lease as in the case of lands unaffected by any equitable interest. Undoubtedly the Government of the United States can be trusted to do justice to all persons having just claims of this nature. Doubtless Congress will, by legislation, provide means and instruments for vesting and confirming such titles. The only question for my decision is whether such power now exists in the Hawaiian government, and I think it does not.

Fifth. Attention is called to the fact that the Executive order under consideration directs that any consideration paid to the local authorities on account of lands sold subsequently to the adoption of the resolution of annexation shall be refunded to the purchasers, and there is no provision of law which authorizes or permits the use of any money in the Hawaiian treasury for that purpose. If this be true, then that portion of the order will be ineffective. I assume it was not intended that payment should be made contrary to

the local law and regulations of Hawaii, or that money should be provided by any arbitrary or unnatural means, but only that in due course of law the money should be appropriated and applied for that purpose.

Very respectfully,

JOHN W. GRIGGS.

The PRESIDENT.

CHECKS—ASSIGNMENTS.

Negotiable paper may be transferred so as to pass the title and ownership, by the indorsement of the payee or indorsee thereon, which may be made as well by the agent of such payee or indorsee as by such principal.

In the making of such indorsement it is only necessary that the agent act by the authority of the principal, which authority may be conferred in writing, orally, or by a continual practice or use, with the permission of the principal.

Section 3477, Revised Statutes, with reference to the assignment of claims, applies only to such claims as require allowance by some accounting officer, an ascertainment of the amounts due thereon, and the issue of a warrant for their payment.

Checks of disbursing officers drawn upon the public Treasury or an assistant treasurer of the United States may be properly indorsed and transferred by either the payee, indorsee, or by an agent of either, acting as such under a power of attorney from such payee or indorsee.

DEPARTMENT OF JUSTICE,

November 27, 1899.

SIR: I have to acknowledge the receipt of your note of November 17, 1899, with the inclosures therein referred to, asking my opinion, in substance, whether checks drawn by disbursing officers of the Government upon the Treasurer or an assistant treasurer of the United States may be legally indorsed and transferred by an agent of the payee, acting as such under a power of attorney given by such payee.

In reply I have the honor to say that it is a part of the general law applicable to mercantile, negotiable paper—of which checks drawn for a certain specified sum and payable on presentation to the order of a person therein named are a species—that such paper may be transferred so as to pass the title to and ownership thereof, by the indorsement of the payee or indorsee thereon, and the general law of agency

is so far applicable thereto that such indorsement may be made as well by the agent of such payee or indorsee as by such principals themselves, the only question in such cases being as to the existence of such authority.

Equally well settled is it that the authority of such agent to make such indorsements may be conferred and shown by either a formal power of attorney, by a less formal writing, or orally, or by a continual practice or use with the permission of the principal. No special form or mode is required, but all that is necessary is that the agent act by the authority of the principal. Nor is it material whether the authority of the agent be conferred at the time that it is exercised, or previously, if it continues when exercised.

These are well-known rules and are mentioned here only for the purpose of stating the law which is applicable to the checks drawn by disbursing officers, to which your inquiry relates. In these respects there is no difference between checks drawn by public officers upon a public depository, and those drawn by a private person on an ordinary bank; both, if payable to order, being transferable by indorsement, which may be made alike, in either case, by the payee or indorsee, or by his agent.

But, while this is the general law applicable to such paper, it may, of course, be changed by express legislation, and the assignment and transfer of such instruments may be prohibited in whole or in part, or the manner of such transfer be prescribed or regulated by such legislation. And I am referred to Revised Statutes, section 3477, and asked whether that section forbids or regulates the assignment and transfer of checks drawn by disbursing officers of the Government upon the Treasurer or an assistant treasurer of the United States, and whether this section is applicable to such checks? That section provides that—

“All transfers and assignments of any claim upon the United States, or of any part or share thereof or interest therein, whether absolute or conditional, and whatever may be the consideration therefor, and all powers of attorney or other authorities for receiving payment of any such claim or of any part or share thereof, shall be absolutely null and void, unless they are freely made and executed in the presence of

at least two attesting witnesses after the allowance of such a claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof. Such transfers, assignments, and powers of attorney must recite the warrant for payment, and must be acknowledged by the person making them before an officer having authority to take acknowledgments of deeds, and shall be certified by the officer; and it must appear by the certificate that the officer, at the time of the acknowledgment, read and fully explained the transfer, assignment, or warrant of attorney to the person acknowledging the same."

Construed literally this section absolutely forbids, and makes absolutely null and void, all transfers and assignments and all warrants of attorney therefor of any claim whatsoever against the United States, or of any share or interest therein until "after the allowance of such a claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof." Consequently, so construed, it absolutely forbids, and makes absolutely null and void, all transfers and assignments and all warrants of attorney therefor of all and every claim against the United States which does not need and does not have any allowance or any "ascertainment of the amount due," and is not paid by any warrant, but is paid in money, for the transfer of such claims can not be made until after an allowance, ascertainment of the amount due, and issue of a warrant, none of which things in very many cases is done; and so, with such construction, such claims can not be assigned or transferred at all.

And yet it is obvious that this class of claims, and there are many of them, already liquidated in every respect, neither needing nor having any allowance or ascertainment of the amount due, and as to which no warrants are issued, but being paid in money, are, of all others, claims the prohibition of the transfer of which is least useful, requisite, or proper.

No better case to illustrate this is needed than this case of disbursing officers charged, we will say, with the duty of purchasing supplies for the Government, and the payment therefor by checks drawn on an assistant treasurer against

money already appropriated and placed there for that purpose, where the assistant treasurer has nothing to do respecting the matter except to pay the checks in money when presented. But under the strict construction referred to the person who sold the supplies and took the check therefor could not indorse it and have it placed to his credit in his bank, and if he did the bank could not receive the money, for it is a "claim upon the United States" and is not transferred "after the allowance of such a claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof," unless, indeed, all of this is, in legal contemplation, done by the disbursing officer in the discharge of his duty in making the purchase and the issuing of his check.

This section forbids the transfer of any claim against the United States until "after the allowance of such a claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof." But, after all this is done, there is nothing of the claim that can be assigned but the warrant itself. The claimant can not go and get the original claim back from the accounting officer and make an assignment of that. This is not what is contemplated, nor is this what is prohibited. The assignment, then, contemplated by this section, and which alone is not prohibited, is that of the warrant itself.

But, "*such transfers, assignments, and powers of attorney must recite the warrant for payment.*" Just what this means, when the only assignment contemplated or permitted is that of the warrant itself, is not clear. And all assignments, that is, of the warrants themselves—for they are all that are permitted to be assigned—must be attested by at least two witnesses and acknowledged before an officer competent to take the acknowledgment of deeds.

It is not necessary in order to reply to the questions you ask to determine just what this very peculiar section means in all these respects, nor to just what claims against the United States its provisions are intended to apply, but it is obvious to me that its prohibition was intended to apply to only such claims as require allowance by some accounting officer, an ascertainment of the amount due thereon and the

issue of a warrant for their payment, and does not refer to claims which neither need nor have either of these, but are paid in money on presentation of a check, and where the person paying has nothing to do but pay the check as presented.

The claims of the President for his salary, those of the heads of Departments for theirs, and those of employees of the Government who receive fixed salaries are all claims against the United States for the payment of which warrants are issued. While the section under consideration may forbid the President, for instance, to transfer the claim for his salary until the warrant issues for its payment, is it possible that his indorsement of such warrant, for deposit in bank, is hampered by the formalities of transfer, the attestation by two witnesses, and his acknowledgment before an officer, and his having read and fully explained to him the effect of such indorsement as defined in that section?

Take, also, the case of the hundreds of thousands of pension warrants issued every quarter to as many pensioners of the United States. It would seem impossible that it could have been intended that every such pensioner, in order to get his money without going to some large city, where only there is an assistant treasurer, or in order that he may get his money at the nearest bank, that every widowed woman or orphan pensioner, must have the indorsement of the pension warrant attested by two witnesses and acknowledged before an officer competent to take acknowledgment of checks and have the effect of such transfers fully explained and made known. The uniform practice ever since there have been any pensioners has been to the contrary. And yet if this section applies at all to such claims all this would be necessary.

United States Treasury notes and other issues of Government paper money are certainly "claims upon the United States," and their transfer and assignment equally forbidden under any literal construction of this section, and if the section refers to all claims upon the United States, and not to those alone which need or have an allowance or ascertainment of the amount due or are paid by warrants, then their transfer is practically prohibited. As they are "claims

upon the United States" why are they not within this prohibition of transfer, unless it is because they neither need nor have any "allowance" or "ascertainment of the amount due" and that no warrant issues for their payment? And if this be the reason, and a sufficient one, why is not the same reason equally effective as to other claims standing, in this respect, in precisely the same situation? Nor is it any answer to this to say these notes are payable to bearer and need no indorsement or formal assignment. This section does not forbid merely the indorsement of such claims, but equally forbids, as to the claims to which it refers, any and all forms of *transfer* and assignment. Nor is it any answer to say these notes are intended to pass from hand to hand, as a medium of business exchange. This is no more true of these notes than, by the ordinary and legal understanding, it is true also of checks, except that the latter require some more formality of transfer and have a less extended circulation. The difference is more in degree than in kind, and even this loses its importance when we reflect that probably 90 per cent of the entire money business of the country is transacted by checks and without the use of any money.

I no more than merely allude to the very great inconvenience to business men and the very great injury to business which would result if the transfer for deposit merely of the very large number of checks upon the Treasurer and assistant treasurer and Treasury warrants which are issued daily in the vast business of the Government were hampered with the formalities prescribed by this section. But this would be a very serious matter and requires almost any possible construction of this section which will avoid it. And I use this and previous illustrations merely to show that this section could not have been intended to refer literally to all "claims upon the United States" and to forbid their transfer unless after allowance and ascertainment of amount due and a Treasury warrant has been issued for their payment.

And against this construction, which would forbid the indorsement, even for deposit, of checks drawn upon the Treasury, and hamper such transfer of Treasury warrants with the formalities prescribed by that section, may be interposed the uniform different practice of the Department,

with the knowledge and tacit assent and approval of Congress from the first. This could hardly have been done, or permitted by Congress, had it been believed to be in violation of this section. The act of February 26, 1853 (10 Stat., 170), was similar to Revised Statutes, section 3477, except that it did not contain the formalities as to transfer prescribed by that section; and yet such checks have been freely indorsed and Treasury warrants freely transferred without such formalities ever since the enactment of those statutes, and with the tacit consent and approval of Congress; and the Supreme Court has more than once said that the construction given to a statute by public officers charged with its administration is entitled to great weight. Indeed, the long-continued and uniform practice of one of the departments of the Government under a statute, and with the tacit assent of Congress, goes far toward making such practice and such construction of the statute the legal one.

Revised Statutes, section 3620, provides that—

“It shall be the duty of every disbursing officer having any public money intrusted to him for disbursement to deposit the same with the Treasurer or one of the assistant treasurers of the United States, and to draw for the same only as it may be required for payments to be made by him in pursuance of law (and to draw for the same only in favor of the persons to whom payment is made).”

The Treasury Department has uniformly construed the words above quoted in parentheses as meaning merely that such checks must be drawn in favor of the person to whom the disbursing officer is required to make payment, and not in favor of any other person, thus prohibiting the transfer of the claim to any other person before its settlement, and not as forbidding any words of negotiability. This is shown by the uniform practice of the Department in recognizing the negotiability of such checks just as it did under the act of 1853, from which section 3477 was taken, and is shown also by the rule of that Department published with special reference to this section 3620, viz:

“Any check drawn by a disbursing officer upon moneys thus deposited must be in favor of the party, by name, to whom the payment is to be made, and payable to ‘order’ or ‘bearer’ with these exceptions.”

The exceptions are of cases where the officer may make the checks payable to himself or "bearer."

Whatever might be my construction of this section 3620, in connection with section 3477, were the question an original one unaffected by long-continued practical construction, after such uniform construction and practice, with the acquiescence of Congress since 1853, when section 3477 was enacted, I am not prepared to say that such construction and practice are now wrong.

Two facts in relation to this matter may be safely predicated. First, Congress has not been ignorant that, by the long and uniform practice of the Department, checks drawn upon the Treasury have been freely transferred and such transfers recognized. And had it supposed that this was in violation of the section referred to, it would have been long since remedied by explicit enactment. And, second, had Congress intended so radical departure from the practice prevailing in most nations, and especially in this country, as would be the prohibition of the transfer of checks drawn upon the Treasury, it would have indicated such intention by language more explicit in that direction than is contained in this section.

We are bound to assume that the acts of every legislature are intended to be reasonable, and to give them, if possible, such construction as will make them so, and to construe them with reference to their purpose and object. The object of the original act of February 26, 1853, from which this section 3477 is taken, was, as expressed in its title, "To prevent frauds upon the Treasury of the United States." As said by the Supreme Court in *Hobbs v. McLean* (117 U. S., 567), on page 576:

"The sections under consideration were passed for the protection of the Government. (*Goodman v. Niblack*, 102 U. S., 556.) They were passed in order that the Government might not be harassed by multiplying the number of persons with whom it had to deal, and might always know with whom it was dealing *until the contract was completed and a settlement made*. Their purpose was not to dictate to the contractor what he should do with the money received on his contract after the contract had been performed."

Nor was it any more such purpose to dictate to him what he should do with the check he received instead of money for such performance. The attainment of this expressed object might well be aided by forbidding the assignment of unsettled claims upon the Treasury, but it is not perceived how that or any needed protection to the Government would be aided by forbidding, after a claim was settled, the indorsement of a check given in its payment. And that a rule which forbids such indorsements is not reasonable, would appear from the common practice of the business world and its common agreement that such indorsements are necessary in the transaction of business.

While the Supreme Court has said, in language even broader than that used in this section, that the act applies to all claims upon the United States, of whatever description, and however arising, yet, from the illustration referred to, and others that might be given, it is apparent that this language was used, as it is in the statute, generally, and was not intended literally and with no possible exception. And, after such expressions, that court itself made several exceptions, and said that the section, notwithstanding its general language, did not apply to transfers or assignments by descent, by will, by involuntary bankruptcy, or even of voluntary assignment under insolvent laws. And it is apparent that there must be still other exceptions from this general language.

But there is another view which may be taken of this section which would relieve it, even under a literal construction, from any objection on account of its too-sweeping language. The section refers only to "claims" upon the United States. Now, in the ordinary, and to a great extent in a legal sense, a mere claim is something asserted on the one hand, and which may be disputed or denied in whole or in part upon the other, and which requires allowance, settlement, or adjustment. It differs, or may differ, from a demand, debt, or obligation, which, if it be such and definite, requires neither of these. And while every debt, demand, or obligation of another is in one sense a claim upon him, yet it is not every claim upon such person that is a demand, debt, or obligation. There is a difference, and a

material one. A mere claim is subject to dispute and settlement; a demand, debt, or obligation, if it be such, is not. Now this section uses the word "claim" several times as expressive of that, the transfer of which is forbidden, and never once uses "demand," "debt," or "obligation," or any other word expressive of anything more than a mere unliquidated claim; and it is not unfair to presume that Congress used this one word and omitted all others purposely, and with a full knowledge of the difference in meaning. And this is rendered more probable by the fact that such transfers are forbidden *until after* such allowance and settlement, clearly indicating that such forbidden transfers are of "claims" which require such allowance and settlement. At any rate, the section is fairly susceptible of this construction; and, in view of the consequences of a construction which would prevent the indorsement of checks, pension and other warrants drawn upon the Treasury, except by the formalities prescribed by this section, the construction indicated would be fully justified.

Upon consideration of the whole matter, I have to advise you that checks of disbursing officers, drawn upon the Treasurer or an assistant treasurer of the United States, may be properly indorsed and transferred by either the payee, or indorsee, or by an agent of either, acting as such under a power of attorney from such payee or indorsee.

Respectfully,

JOHN W. GRIGGS.

The SECRETARY OF THE TREASURY.

HARBOR IMPROVEMENTS—CONSTITUTIONAL LAW.

The authorities of the city of Chicago have no legal power to prohibit the Government contractors from dumping material dredged from the harbor at Chicago within the limits selected and designated by the Secretary of War, in accordance with the authority conferred upon him by law.

The power of the United States to regulate commerce is general, absolute, and without limit, either as to the time, place, or detail of its exercise, except as to waters whose entire navigability for commerce is limited to the confines of a single State.

This power includes the right to regulate the use of all the means and instrumentalities used in commerce, whether on sea, river, harbor, or land, and entirely irrespective of whether a State has attempted to regulate the same matter or not.

Commerce is not restricted to the purchase, sale, and barter of commodities, but it includes navigation, intercourse, and the reception and transportation and delivery of passengers and freight by land and water, and also the means or instrumentalities used in such commerce.

Congress has power to regulate and improve the harbors of the navigable waters of the United States, and this carries with it the right to deposit the material removed in making the improvements in any other part of the harbor or navigable waters or other place within its control.

DEPARTMENT OF JUSTICE,

December 4, 1899.

SIR: I have the honor to acknowledge the receipt of your request, indorsed upon the papers, November 13, 1899, for an opinion "whether the authorities of the city of Chicago can legally prohibit the dumping of material dredged from the harbor of Chicago, under contracts with the Government, within the limits selected and designated by the Secretary of War in accordance with the authority conferred upon him by the laws of Congress."

From the papers accompanying your request it appears that in 1897 some questions arose between the officers of your Department in charge of harbor improvements there and the authorities of the city of Chicago as to where the material dredged from that harbor should be deposited, with a view to the prevention from pollutions of the water of Lake Michigan in that vicinity, largely used for domestic purposes by the people of that city. In view of this the Secretary of War, with the assent of the city authorities, selected and designated the place for the deposit of such material in the waters of the harbor.

Afterwards contracts involving very large sums were made by the United States for dredging and deepening the harbor of Chicago, and for the deposit of the removed material within the limits thus designated by the Secretary of War. These contracts are in course of execution, and while being performed by the contractors, under direction of the United States, the city of Chicago has, so far as it can, prohibited the deposit of any such material in the waters of

Lake Michigan within 8 miles of the shore in front of that city, and arrested several of the persons engaged in making such deposit under said contracts within this 8-mile limit. This was done under an ordinance of the city forbidding such deposits within 8 miles of the shore, which ordinance was in force at the time of the designation, as above stated, of the place of deposit of dredged material, and when said contracts were made, but of which the United States officers do not appear to have been aware.

The case presented involves, upon the one hand, the jurisdiction and power of the United States in the exercise of its power to regulate commerce, and upon the other the jurisdiction and power of the city over and within the navigable waters of the United States, with a view to the health, comfort, and welfare of its people. Such questions in a Government like ours are always of a delicate character, and require delicate and considerate treatment. And it is to be presumed that the officers of the Government in charge of such work, in the exercise of the powers of the Government, will act, and in fact do act, with a proper regard for the health, comfort, interest, and convenience of the people who may be directly affected thereby, as well as of the general public. But, after all, it is generally in such cases more a question of power than of whether that power has been exercised in the best or the most reasonable manner.

In an opinion given to your Department June 8, 1899, in relation to the power of the Secretary of War to establish or modify harbor lines in the harbors of Tacoma and Seattle, in the State of Washington, I had occasion to consider at some length the powers of Congress and of the Secretary of War in respect of harbors, their regulation and improvement, in the navigable waters of the United States, and from which I quote, as applicable to the case here presented.

Speaking of the power of Congress to improve and regulate harbors, I there said:

“The conceded and unquestioned right of a nation to control, within certain limits, the waters of its coasts, and the navigable waters within its territory, would, of itself be ample for this purpose.”

"Besides this, the Constitution, article 1, section 8, provides that Congress shall have power 'To regulate commerce with foreign nations and among the several States and with the Indian tribes.'

"This grant of power to regulate commerce is general, absolute, and without limit either as to the time, place or detail, or extent of its exercise (*Gibbons v. Ogden*, 9 Wheat., 1, 196), except, of course, waters whose entire navigability for commerce is limited to the confines of a single State. In delivering the opinion of the court in that case, Chief Justice Marshall said (p. 196):

"This power, like all others vested in Congress, is complete in itself. It may be exercised to its utmost extent, and acknowledges no limitations other than those prescribed in the Constitution. These are expressed in plain terms. * * * If, as has always been understood, the sovereignty of Congress, though limited to specified objects, is plenary as to those objects, the power over commerce with foreign nations and among the several States is vested in Congress as fully as it would be in a single government, having in its constitution the same restrictions on the exercise of the power as are found in the Constitution of the United States.'

"But the same instrument that confers this power imposes also certain specific restraints upon its exercise; so that both together result in the plenary power of Congress, except as thus limited in particular instances. And, as these limitations have no reference to matters here involved, we may treat the power of Congress in this respect as without limit.

"This general and absolute control of Congress of the whole matter of commerce upon waters, as it has always been exercised with the consent and sanction of every Department of the Government, and therefore legally exercised, is tersely stated by Justice Miller in delivering the opinion of the court in *Wisconsin v. Duluth* (96 U. S., 379). He says, page 383:

"It is to be observed * * * that the whole system of river and lake and harbor improvements, whether upon the sea coasts, the lakes, or the great navigable rivers of the interior, have for years been mainly under the control of

that Government, and that whenever it has taken charge of the matter its right to an exclusive control has not been denied.'

"And speaking of certain acts of Congress for the improvement of the harbor of Duluth, he says, page 387:

"Nor can there be any doubt that such action is within the constitutional power of Congress. It is a power which has been exercised ever since the Government was organized under the Constitution. The only question ever raised has been how far and under what circumstances the exercise of the power is exclusive of its exercise by the States. And while this court has maintained in many cases the right of the States to authorize structures in and over the navigable waters of the States, which may either impede or improve their navigation, in the absence of any action of the General Government in the same matter the doctrine has been laid down with unvarying uniformity that when Congress has, by any expression of its will, occupied the field, that action is exclusive of any right to the contrary asserted under State authority.'

"And he refers, among others, to the following cases:

South Carolina v. Georgia (93 U. S., 4).

Pond v. Turk (95 U. S., 459).

Gibbons v. Ogden (9 Wheaton, 1).

Wilson v. The Blackbird Marsh Company (2 Pet., 345).

The Wheeling Bridge Case (18 How., 421).

Gilmon v. Philadelphia (3 Wall., 713).

"These cases, and many others which might be cited, fully sustain this doctrine, and also that the power to regulate commerce includes the power to regulate the use of all the means and instrumentalities used in commerce, whether on the sea, the navigable rivers and lakes, in the ports and harbors, or on land, and entirely irrespective of whether a State has attempted to regulate the same matter or not. Indeed, outside of customs and revenue laws, the most of the regulations of commerce are those regulating the use of the means and instrumentalities by which it is carried on.

"At this day it must be regarded as settled that commerce is not restricted to the purchase, sale, and barter of commodities, but that it includes also navigation, intercourse, and

the reception, transportation, and delivery of passengers and freight by land and water, and also the means or instrumentalities used in such commerce. From the many cases affirming this the following may be cited with those above:

Gibbons v. Ogden (9 Wheaton, 1, 196).

Cases of the Export Tax (15 Wall., 232).

Pensacola Telegraph Company v. Un. Telegraph Company (96 U. S., 1, 9).

Gloucester Ferry Company v. Pennsylvania (114 U. S., 196, 203).

"Then, as commerce includes navigation, and as harbors are incidental and as essential to navigation as are vessels themselves, it is obvious that, under this power, Congress may establish and regulate (and improve) harbors."

I have quoted thus largely from the opinion referred to because it states also the law applicable to the present case. Under the decisions referred to it can not be doubted that, under the constitutional power to regulate commerce, including, as that does, navigation and all the means and instrumentalities necessary to navigation, Congress has power to regulate and improve the harbors of the navigable waters of the United States by dredging the bottom and deepening the water, or in such other ways as it deems necessary in aid of navigation. And this, of course, carries with it the right to deposit the material thus removed in any other part of the harbor or the navigable waters of the United States, or other places within its control.

Probably this detail of the regulation of commerce—the improvement of harbors—is one in which the State or a municipality has and may exercise jurisdiction until and except as the Federal Government has indicated its intention or exercised its jurisdiction; but whenever the latter is done it is exclusive of every other jurisdiction, control, or interference, as are all the powers vested in Congress. It is impossible to conceive of two supreme or sovereign powers in respect of the same matter; and as to harbors and all that pertains to their improvement, the power to direct and control is supreme in either the State, the municipality, or the United States. It can not be in all, or in any two; and the power of either to dictate what improvements shall be made,

or how, or when, is a supreme power in this respect. The Constitution "and the laws of the United States made in pursuance thereof," which are "the supreme laws of the land, * * * anything in the constitution or laws of any State to the contrary notwithstanding," have vested this supreme power in Congress, and not in any State or municipality.

This constitutional power and control extend over all the navigable waters of the United States, except those the navigability of which for commerce is confined within the limits of a single State; and it is unnecessary to add that, as to the improvement of rivers and harbors, this power carries with it a discretion as to what improvements shall be made, how, where, and by what means. And because, as before stated, the navigable waters of the United States, both inside and outside of harbors, are under the control of Congress, that body may decide where or in what places in those waters any structure may or may not be built, and where any deposits of material may or may not be made. This is but a detail of the improvement, regulation, or protection of such rivers and harbors, and is clearly within the power of Congress.

But, like very many other powers conferred upon Congress, the power to improve rivers and harbors is one which Congress can not itself execute directly and in person, but must be executed by agents thereto appointed; and, for many years, nearly all of this has been by Congress referred to and placed under the direction of the Secretary of War, who in the performance of this duty exercises the power of Congress and of the United States. As is said by the Supreme Court in *Wisconsin v. Duluth* (96 U. S., 379), on page 383:

"The operations of the Government in this regard have been conducted by the Bureau of Engineering as a part of the War Department, to which Congress has confided the execution of its wishes in all these matters."

This reference of such matters to the Secretary of War, and to his direction, is most commonly made by the acts making appropriations for such improvements, which, generally, provide merely that the money there appropriated is to be expended under the direction of the Secretary of War.

This is also the case in the act of March 3, 1899, making appropriations for the improvement of the harbor at Chicago here under consideration. It provides:

“That the following sums of money are hereby appropriated, * * * to be immediately available, and to be expended under the direction of the Secretary of War and the supervision of the Chief of Engineers.”

And while the act specifies some of the improvements to be made, yet the whole matter of the manner of making them, both generally and in detail, is, by the act, placed under the direction and discretion of the Secretary of War, and under the supervision of the Chief of Engineers, as is usual in such cases, who, in directing such improvements, generally and in all their details, and those acting under them, are exercising the powers of Congress and of the United States, lawfully conferred upon them, and they can not be interfered with in the performance of this duty by any State or municipal authority. And it follows also that the Secretary of War, in thus selecting and designating a place for the deposit of material dredged from the harbor, was quite within the limit of his power and duty.

If it be thought that, in the performance of the work of improving the harbor at Chicago, any detail of the mode adopted by the Secretary of War—for instance, the place selected for deposit of dredged material—will be injurious or dangerous to the health or comfort of the people of that city, the remedy is by appeal to the good sense, discretion, and fairness of the Secretary, and not by municipal interference with public work ordered by Congress, or the arrest of persons engaged in that work. And while an ordinance of the city of Chicago may, as to all persons subject to its jurisdiction, forbid the deposit of any heavy substance in the waters of Lake Michigan within 8 miles of the shore in front of that city, it can not control or limit the power of Congress over the navigable waters of the United States, nor dictate where it shall or where it shall not deposit, within such waters, material removed in the improvement of one of its harbors.

I have, therefore, to advise you that the authorities of the city of Chicago have no legal power to prohibit the

Government contractors referred to from depositing, by direction from your Department, the material removed in the work of improving the harbor at that place, within the area heretofore designated therefor by the Secretary of War.

Respectfully,

JOHN W. GRIGGS.

The SECRETARY OF WAR.

CONCESSIONS—CUBA.

There is no objection to the submission to Congress of the claim of the British Cuba Submarine Telegraph Company for damages by our vessels occurring during the hostilities with Spain.

Since the exchange of ratifications of the peace treaty with Spain the occupation of Cuba by the United States has been occupation of a foreign country in time of peace, and is not made a temporary war occupation or otherwise affected, internationally speaking, by the circumstance that the Army has been used as the agency.

In ascertaining the obligation of the United States with regard to any debts that the government of Cuba may inherit from the former (Spanish) government of Cuba, as being the government of the same nation or people, there should be taken into consideration the fact that Cuba is being occupied pursuant to the resolutions of April 20, 1898, with the sole object of its pacification preparatory to turning over the control to the people of Cuba, which can not be done until its people have organized a government to receive it.

DEPARTMENT OF JUSTICE,

December 6, 1899.

SIR: I have received your letter of the 13th ultimo, inclosing one from the British chargé d'affaires, who calls attention to the fact that he has not as yet been honored with a reply to his note of the 25th of last May, setting forth arguments concerning the obligations of the United States in the matter of Spanish concessions secured by English telegraph companies, and, aside from that, asks that a claim of the Cuba Submarine Telegraph Company for damages by our vessels during the hostilities with Spain be referred to Congress in the same manner as that of the Eastern Extension Australasia and China Telegraph Company. I had previously received from you his note of the 25th of May.

He says your Department has promised to refer the last-mentioned claim "with a suitable recommendation," the

nature of which recommendation is not more particularly stated by you.

You call my attention to his statement of the inability of his Government to concur in my views on the subject of the concessions as set forth in your Department's note, which you say was based on mine of the 17th of March last, and desire to be advised of my views as to the propriety of an arrangement "to submit the subject in question to Congress, as has been done in the claim of the Eastern Extension Australasia and China Telegraph Company."

I see no objection to such submission to Congress of the claim for damages during hostilities; but, of course, express no views as to the arrangement and recommendation in the other case, not knowing what they are. The two claims are similar, however, and I see no reason for other than the same treatment of both in any reference to Congress.

I return the detailed statement of the damages for transmission to Congress.

These claims do not appear to have any relation to the matter referred to in the note of May 25, last.

My views, as set forth in your Department's note of last spring to the *chargé*, are quoted by him as follows:

"With regard to the Antilles, you informed me that the United States Attorney-General holds that 'the present American control of Cuba is essentially and merely that exercisable by a temporary military occupation; that the United States Government, not having established a protectorate over Cuba, is not called upon to discuss the question of the transitory obligations which devolve upon a protecting state.'"

It seems that the text of my communication and its date were unknown to the *chargé*, and hence he was not aware that I wrote before the treaty with Spain had been ratified by the government of that country, and that I spoke of our Government as "still theoretically at war with Spain."

By reason of this misapprehension the *chargé's* arguments are not addressed to the state of affairs which I was discussing, so that any further discussion of the apparently divergent views heretofore expressed by me and by Her Majesty's representative upon this subject is unnecessary.

I agree with the chargé in thinking that our occupation of Cuba is now other than analogous to a military occupation of a foreign country in time of war. Since the exchange of ratifications of the peace treaty it has been an occupation of a foreign country in time of peace, and in no way affected, internationally speaking, by the circumstance that the Army has been used as the agency. (Calvo, sec. 3144.)

I concede, the treaty having been duly ratified, that Great Britain has a right to appeal, on behalf of her subjects, to the rules prevailing in time of peace. But she has not necessarily the right to ignore the new facts which have followed the cessation of the sovereignty of Spain. Nor do I understand that the chargé questions our duty and right as asserted in the joint resolutions of April 20, 1898, now partly executed. In pursuance of those resolutions, Spain has been induced to relinquish her authority in Cuba, and to cease her opposition to the complete carrying out of our duty, which contemplated an occupancy of Cuba until "the pacification thereof," and then the turning over of the island to the control and government of its people. In performance of this duty, we are accordingly occupying Cuba and preparing to turn over the control. This can not be done until the people have organized a government to receive it.

These are facts which are to be reckoned with in ascertaining our obligations with regard to such debts as that government may take over from the former government of Cuba, as being the government of the same nation or people.

I am not sure that I am able to understand precisely from any papers or communication on this subject now in my possession what action, if any, is desired of this Government by the Government of Her Majesty. If you will have the kindness to intimate to me the exact request of the chargé I shall be happy to give it my attention, and to advise you accordingly.

Respectfully,

JOHN W. GRIGGS.

The SECRETARY OF STATE.

NAVY—RETIREMENT—PROMOTION.

The order of the President, dated July 1, 1899, retiring certain officers under the naval personnel law, had the effect to retire Lieutenant-Commander Driggs on June 30, 1899, and thus created a vacancy in the fiscal year ending with that date, and the promotion of Lieutenant McLean to fill such vacancy should date from the 30th day of June.

Lieutenant McLean is entitled to the grade and rank indicated by his commission, together with the emoluments attached, from and including the 1st day of July, 1899.

Vacancies occurring through retirements, as provided under the naval personnel law, are to occur or be accredited to the fiscal year which ends with the 30th of June.

The retirements under section 8 of the law are to be made from the list of voluntary applicants for the fiscal year then being considered, to take effect on the last day of the fiscal year.

DEPARTMENT OF JUSTICE,

December 7, 1899.

SIR: I have the honor to acknowledge receipt of yours of October 10, 1899, requesting an opinion upon a question which has arisen in your Department under the provisions of sections 8 and 9 of the act "To reorganize and increase the efficiency of the personnel of the Navy and Marine Corps of the United States," approved March 3, 1899. The facts submitted are in substance as follows:

A vacancy was occasioned in the grade of lieutenant-commander in the Navy by the retirement under the provisions of section 8 of the said act of Lieut. Commander William H. Driggs, which vacancy was filled by the promotion of Lieut. Walter McLean. At the close of the fiscal year ending June 30, 1899, in order to create the vacancies provided in the said act, the Secretary of the Navy recommended to the President the retirement of certain officers who had filed official applications and had their names placed on the list of applicants for voluntary retirement under the provisions of section 8 of the act, and on the 1st day of July, 1899, the President made the following order in reference to the said list of officers named therein and recommended for retirement by the Secretary of the Navy:

"The above recommendation of the Secretary of the Navy is approved, and, pursuant to the provisions of section 8 of the act entitled 'An act to reorganize and increase the effi-

ciency of the personnel of the Navy and Marine Corps of the United States,' approved March 3, 1899, the officers whose retirement is recommended by him will be retired from active service and placed upon the retired list as for the fiscal year ending June 30, 1899."

Lieut. Commander William H. Driggs, who had theretofore filed his official application with the Secretary of the Navy for retirement under section 8, was among the officers recommended for retirement by the Secretary of the Navy and was included in the above order signed by the President on July 1, 1899. On the 5th day of July, 1899, Lieutenant Commander Driggs was notified by letter from the Secretary of the Navy of his retirement, and was informed in the same communication that he was placed upon the retired list of officers of the United States Navy from July 12, 1899. Thereupon, Lieut. Walter McLean, of the United States Navy, who was promoted to fill the vacancy occasioned by the retirement of Driggs, was given a commission bearing date July 13, 1899, the day following the date on which the retirement of Driggs, according to the notification of the Secretary of the Navy, was to go into effect. It is also stated that Driggs remained upon the active list up to and including the 12th day of July, 1899, and the opinion desired is as to whether, under these circumstances, Lieutenant-Commander McLean's commission should bear date July 13, 1899, or July 1, 1899.

It is suggested that if the commission of McLean, who was promoted to fill the vacancy occasioned by the retirement of Driggs, should bear date of July 1, 1899, then, from the said date until and including the 12th day of July, 1899, the number of officers prescribed by law for that grade would be exceeded; in other words, that for the twelve days as stated there would be two officers filling a grade in which the law seemingly provides for only one.

Then the question is presented as to whether sections 8 and 9 of the act under consideration contain express or implied authorization of such temporary excess.

In answer to the last question, I am of the opinion that the law does not authorize such excess of officers of the same grade, either expressly or impliedly; and, further, that in

the administration of the two sections under consideration, according to their true intent and meaning, there can be no such excess of officers.

In order to have the matter fully before us, I think it well to copy sections 8 and 9 of the act, which are as follows:

"SEC. 8. That officers of the line in the grades of captain, commander, and lieutenant-commander may, by official application to the Secretary of the Navy, have their names placed on a list which shall be known as the list of 'applicants for voluntary retirement,' and when at the end of any fiscal year the average vacancies for the fiscal years subsequent to the passage of this act above the grade of commander have been less than thirteen, above the grade of lieutenant-commander less than twenty, above the grade of lieutenant less than twenty-nine, and above the grade of lieutenant (junior grade) less than forty, the President may, in the order of the rank of the applicants, place a sufficient number on the retired list, with the rank and three-fourths the sea pay of the next higher grade, as now existing, including the grade of commodore, to cause the aforesaid vacancies for the fiscal year then being considered.

"SEC. 9. That should it be found at the end of any fiscal year that the retirements pursuant to the provisions of law now in force, the voluntary retirements provided for in this act, and casualties are not sufficient to cause the average vacancies enumerated in section eight of this act, the Secretary of the Navy shall, on or about the first day of June, convene a board of five rear-admirals, and shall place at its disposal the service and medical records on file in the Navy Department of all the officers in the grades of captain, commander, lieutenant-commander, and lieutenant. The board shall then select, as soon as practicable after the first day of July, a sufficient number of officers from the before-mentioned grades, as constituted on the thirtieth day of June of that year, to cause the average vacancies enumerated in section eight of this act. Each member of said board shall swear or affirm that he will, without prejudice or partiality, and having in view solely the special fitness of officers and the efficiency of the naval service, perform the duties imposed upon him by this act. Its finding, which shall

be in writing, signed by all the members, not less than four governing, shall be transmitted to the President, who shall thereupon, by order, make the transfers of such officers to the retired list as are selected by the board: *Provided*, That not more than five captains, four commanders, four lieutenant-commanders, and two lieutenants are so retired in any one year. The promotions to fill the vacancies thus created shall date from the thirtieth day of June of the current year: *And provided further*, That any officer retired under the provisions of this section shall be retired with the rank and three-fourths the sea pay of the next higher grade, including the grade of commodore, which is retained on the retired list for this purpose."

It will be seen that section 8 fixes the number of vacancies which are to occur or be created in a fiscal year to be, above the grade of commander, thirteen; above the grade of lieutenant-commander, twenty; above the grade of lieutenant, twenty-nine; and above the grade of lieutenant (junior grade), forty; and where such vacancies in the several grades do not exist in the ordinary course of events the Congress by this law provides two methods by the one or both of which, at the end of the fiscal year, a sufficient number of such vacancies are to be created as are necessary to reach the number prescribed in each of the grades named.

The first plan prescribed is to permit officers of the line in the grades of captain, commander, and lieutenant-commander to make official application to the Secretary of the Navy to have their names placed on a list of applicants for voluntary retirement; and from this list the President, in the order of the rank of the applicants, is authorized to place a sufficient number on the retired list to create vacancies to the number provided for by the act. If a resort to this plan does not result in creating the desired number of vacancies, then the Secretary of the Navy is empowered to convene a board composed of five rear-admirals on or about the 1st of June, and to place at the disposal of the board the service and medical records on file in the Navy Department of all the officers in the grades of captain, commander, lieutenant-commander, and lieutenant, and this board is to select

from the list thus furnished, as soon as practicable after the 1st day of July, a sufficient number of officers from the grades mentioned as constituted on the 30th day of June of that year to cause the average vacancies enumerated in section 8 of the act. The findings of the board are to be transmitted to the President in writing, and the President is required to make a transfer of the officers selected by the board to the retired list.

I think the intention of Congress is plainly expressed in these two sections; so much so, at least, that there need be no confusion in the administration of the law. The vacancies provided for are to occur or be created for the fiscal year which ends with the 30th of June. Under section 8 of the act the retirements are to be made from the list of voluntary applicants and for *the fiscal year then being considered*. If the number of vacancies are not created by the retirement of voluntary applicants, then, under section 9, the board authorized to be appointed by the Secretary of the Navy is to convene on or about the 1st day of June of the current year, and from the records furnished enough retirements are to be arbitrarily made by this board to complete the number of vacancies for the fiscal year.

Now, in the case of the retirement of those who have voluntarily applied, the retirement, according to the act, takes effect on the last day of the fiscal year, which is the 30th of June. No injustice can be done to the retiring officers in such case, for the reason that, with the act of Congress before them, these officers voluntarily file their applications for retirement under its provisions, which mean that the retirement is to go into effect on the 30th of June, the end of the fiscal year. This view of the law is strengthened by the provision of section 9, which follows. The retirements under section 9 are not upon voluntary application. They are made by the board, and the officers to be retired are selected after an examination of their records as furnished by the Navy Department. It is, therefore, provided that this board shall meet on or about the 1st of June, evidently in order that the report of the board may be made to the President so that the retirements made in this section can also take effect at the end of the

fiscal year. If there were any doubt about this interpretation of the law, the provision in section 9, which is as follows: "The promotions to fill vacancies thus created shall date from the thirtieth day of June of the current year," removes it. The vacancies referred to in this paragraph are the vacancies created under the plans provided in one or both of sections 8 and 9 of the act. The language of the sections under consideration not only, in my opinion, warrants the interpretation which I have placed upon them, but it will be seen that such construction conduces to a methodical and orderly administration of the law. It results in making all the vacancies created under the provisions of the two sections, 8 and 9, of the act take effect on the last day of the fiscal year, and the promotions made to fill such vacancies go into effect on the day immediately following the last day of the fiscal year, viz, on the first day of July of the current year.

I therefore advise you that, in my opinion, the order of the President, though dated on the 1st of July, 1899, had the effect to retire Lieut. Commander William H. Driggs on the 30th day of June, 1899, and thus create a vacancy for and within the fiscal year ending with that day, and that the promotion of Lieut. Walter McLean to fill the vacancy thus created by the retirement of Lieutenant-Commander Driggs should date from the said 30th day of June. In other words, his promotion, and his commission in pursuance thereof, should bear date as of the 1st day of July, 1899; and I also am of opinion that he is entitled to the grade and rank indicated by his said commission, together with the emoluments attached, from and including that date.

Respectfully,

JAMES E. BOYD,
Assistant Attorney-General.

Approved.

JOHN W. GRIGGS.

The SECRETARY OF THE NAVY.

LETTER CARRIERS—CIVIL SERVICE.

In the exercise of his discretion the Postmaster-General abolished the free-delivery service at Huron, S. Dak., on January 15, 1895, and in consequence certain carriers were separated from the service. *Held*, That on the reestablishment of free-delivery service at that place the former carriers could not be reinstated under rule 9 of the civil-service rules.

To entitle a person to reinstatement in the civil service under rule 9, by reason of the reduction of force, such reduction must be one required by law and not one caused by the exercise of a discretionary power vested in an executive officer.

DEPARTMENT OF JUSTICE,

December 9, 1899.

SIR: Under date of November 3, 1899, you submit for my opinion a question arising under the third proviso of rule 9 of the civil-service rules as amended by the order of May 29, 1899. As stated by you, the facts are as follows:

“The Postmaster-General, in the exercise of his discretion, under the provisions of the act of January 3, 1887 (par. 1, 24 Stat., 355), and in compliance with the requirements of the act of March 3, 1877 (19 Stat., 384), abolished the free-delivery service at Huron, S. Dak., on January 15, 1895, and in consequence three letter carriers and one substitute carrier became separated from the service.

“In view of the fact that the gross receipts of the Huron, S. Dak., post-office again reached the amount required by law for the establishment of the free-delivery service, an order was issued for the reestablishment of the service on September 1, 1899, and for the reinstatement, under rule 9 of the civil-service rules, of those carriers who were separated from the service on January 15, 1895, and who were then available.”

The question propounded for my decision is whether these three letter carriers and one substitute carrier are entitled to reinstatement under that clause of rule 9 of the civil-service rules which declares, “Any person who has been separated from the service by reason of a reduction of force specifically required by law may be reinstated without

regard to the length of time he or she has been separated from the service."

The statute which governs the institution and abolition of the free-delivery system is the act of January 3, 1887 (24 Stat., 355), the first section of which provides as follows:

"That letter carriers shall be employed for the free delivery of mail matter, as frequently as the public business may require, at every incorporated city, village, or borough containing a population of fifty thousand within its corporate limits, and may be so employed at every place containing a population of not less than ten thousand, within its corporate limits, according to the last general census, taken by authority of State or United States law, or at any post-office which produced a gross revenue, for the preceding fiscal year, of not less than ten thousand dollars: *Provided*, This act shall not affect the existence of the free delivery in places where it is now established: *And provided further*, That in offices where the free delivery shall be established under the provisions of this act, such free delivery shall not be abolished by reason of decrease below ten thousand in population or ten thousand dollars in gross postal revenue, except in the discretion of the Postmaster-General."

The effect of the second proviso of this section is to leave it within the discretion of the Postmaster-General to continue or abolish the free-delivery system in offices where the population has fallen below ten thousand in number or the gross postal revenue has fallen below the sum of ten thousand dollars. The free delivery at Huron was abolished by the Postmaster-General in the exercise of this discretion, and not because of any specific requirement of the law. I do not think it is a case arising under the proviso of the civil-service rules above quoted. There may be doubt as what is meant by the phrase "specifically required by law," the doubt arising from the indefinite nature of the word "specifically;" but there can be no doubt that the reduction of force referred to must be one *required by law*, and not one which is caused by the exercise of the discretionary power

vested in an executive officer. It must be a reduction which, under the law, is compulsory, and not one which is optional.

I therefore advise you that the carriers referred to are not entitled to reinstatement under the rule referred to.

Very respectfully,

JOHN W. GRIGGS.

The POSTMASTER-GENERAL.

WHARVES—LANDS—STATUTORY CONSTRUCTION.

Whenever a power is given by statute, everything for the making of it effectual, or requisite to attain the end, is implied.

The act of March 3, 1899, making an appropriation for "transportation of the Army and its supplies," impliedly authorizes the Secretary of War to purchase for the United States such land as in his judgment may be necessary for the erection of the wharf or wharves as contemplated by the appropriation, and the land so purchased can be paid for out of said appropriation.

DEPARTMENT OF JUSTICE,

December 18, 1899.

SIR: I have the honor to acknowledge the receipt of your letter of June 7, 1899. You request my opinion as to whether or not under existing law the Secretary of War has authority to purchase land to be improved and used for wharfage for the ships employed by the War Department in its transport service.

Section 3736 of the Revised Statutes is as follows:

"No land shall be purchased on account of the United States, except under a law authorizing such purchase."

The question, then, to be considered is whether or not, in the face of this statute, there is any law which expressly or impliedly authorizes the purchase of land upon which to construct wharves for the use of the United States.

The act making appropriations for the support of the Regular and Volunteer Army for the fiscal year ending June 30, 1899 (30 Stat., 1064), which became a law March 3, 1899, under the head of "Transportation of the Army and its supplies," appropriates \$17,500,000 to be expended for certain purposes named under the said head, and among other

objects for which the said appropriation is made I find the following:

* * * "And in opening roads and building wharves * * * the expense of sailing public transports on the various rivers, the Gulf of Mexico, and the Atlantic and Pacific Oceans; * * * and for constructing roads and wharves."

It will be seen that there are two clauses in the act which authorize the Secretary of War to use such part of this appropriation as may be necessary in building or constructing roads and wharves. The terms "building" and "constructing," as used in the act, in so far as they refer to wharves, appear to be synonymous, and undoubtedly confer the power upon the Secretary of War to erect for the use of the transport service of the United States such wharves as in his opinion may be necessary.

It is a settled rule of interpretation that whenever a power is given by statute, everything for the making of it effectual, or requisite to attain the end, is implied. (1 Kent's Com., 464.) Now, apply this rule to this case. It is impossible to build a wharf without having the land upon which to build it. Then, when Congress has made an appropriation, and one of the objects for which the appropriation is to be used, specially designated in the act, is the construction of wharves, does it not necessarily follow that the right to purchase land upon which to build such wharves is implied? In what other manner can land upon which a wharf is to be erected be obtained? Proceedings in condemnation, if such could be had, would result virtually in the purchase of the land condemned, for such land as might be taken would be at an appraised value to be paid for by the Government; and, in the absence of express provision in the statute, the same objection can be urged to taking any part of the appropriation with which to lease land as may be suggested to the purchase of land on account of the United States to be used for the location of wharves. I think, therefore, that the only reasonable construction is to conclude that the authority to construct wharves impliedly authorizes the purchase of the necessary land for the purpose.

In 15 Opin., 212, Mr. Attorney-General Devens construed that part of the appropriation act of March 3, 1875, which reads as follows:

"That one hundred thousand dollars * * * shall be used for and applied toward the construction of a movable dam, or a dam with adjustable gates, for the purpose of testing substantially the best method of improving permanently the navigation of the Ohio River and its tributaries; the location of this work, with the plan of construction and the application of the amount hereby appropriated, to be submitted to the Secretary of War for his approval."

Referring to the above statute, Mr. Devens says :

"In my opinion, that provision impliedly authorizes the purchase, with the approval of the Secretary of War, of such land as is necessary for the construction of the dam."

Upon a comparison of the statutes which Mr. Devens was construing with the one now under consideration, it will be observed that the authority to purchase land for the dam to be erected in the one case was no more express than is the authority for the purchase of land for the construction of wharves in the other. But such authority must be implied in either case in order to permit the Secretary of War to carry out the purposes of the act.

I therefore advise you that, in my opinion, the provision of the act of March 3, 1899, which I have referred to above, impliedly authorizes the Secretary of War to purchase, on account of the United States, such land as in his judgment may be necessary for the erection of a wharf or wharves, as contemplated by the appropriation, and that land so purchased on account of the United States can be lawfully paid for from the said appropriation.

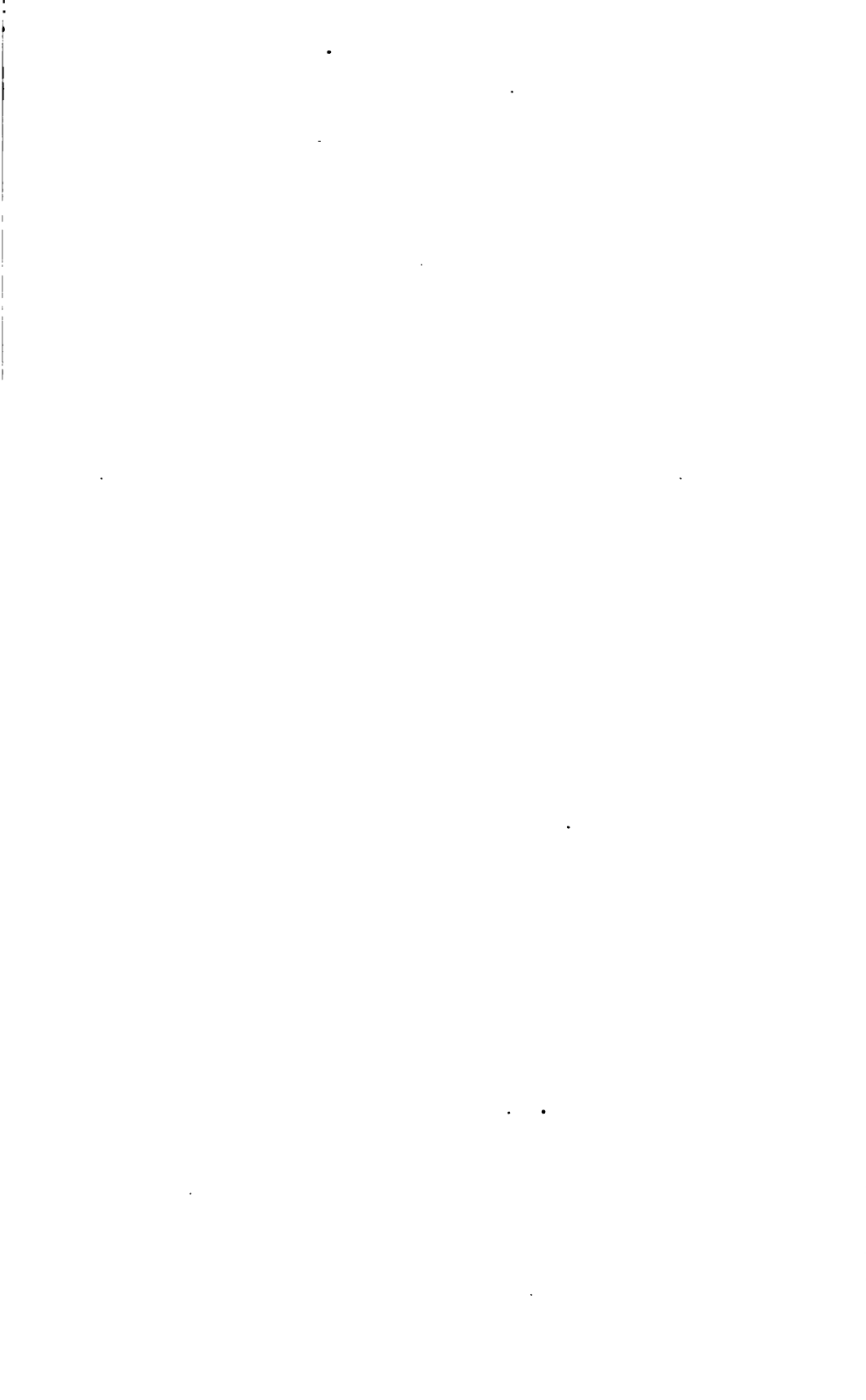
Very respectfully,

JAMES E. BOYD,
Assistant Attorney-General.

Approved.

JOHN W. GRIGGS.

The SECRETARY OF WAR.



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APPEALS.

1. In case of an appeal to a higher tribunal for review, the original judgment stands in suspense until the appellate court, by a judgment of its own, shall supersede it. 340.
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APPROPRIATIONS.

1. The act of July 1, 1898, making an appropriation "to enable the Secretary of the Treasury to pay" a certain individual a specified amount, being mandatory, the Secretary has no discretion to pass upon the fact whether such amount or any portion thereof ought to be paid. 295.
2. The emergency fund of \$3,000,000 provided by the act of January 5, 1899, is intended to cover emergencies arising in the military administration of Cuba and other territory that has come into the possession of the United States through the operations of war. 301.
3. The respective appropriations for agricultural experiment stations, and for agricultural colleges and schools, being separate and distinct, no portion of that for the former can be applied to the payment of the salaries of the professors or teachers in the latter. 470.
4. The act of March 3, 1899, for deepening the channel north of Pelican Island, from Galveston Harbor to Texas City, Tex., makes an appropriation of \$250,000 for the work. 489.
5. There is no authority for paying out of this appropriation any expenses for making the contract, inspecting or superintending the work, unless it be indirect through a provision in the contract that these expenses shall be paid by the contractors and charged against their compensation. *Ib.*
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7. The act of March 3, 1899, making an appropriation for "transportation of the Army and its supplies," impliedly authorized

APPROPRIATIONS—Continued.

the Secretary of War to purchase for the United States such land as in his judgment may be necessary for the erection of the wharf or wharves as contemplated by the appropriation, and the land so purchased can be paid for out of said appropriation. 665.

ARMY.

1. A person convicted of desertion from the military service and afterwards pardoned by the President, under section 118, Revised Statutes, would be restored by reason of the pardon to all the rights and privileges of a citizen which he had anterior to such conviction. 36.
2. While the President's pardon restores a criminal to his legal rights and fully relieves him of the disabilities legally attaching to his conviction, it does not destroy an existing fact that his service was not faithful and honest. *Ib.*
3. A recruiting officer has the right to reject a candidate for enlistment in the Army whose service during his previous term was not honest and faithful, notwithstanding the pardon of the offense. *Ib.*
4. The Secretary of War has no authority to make a regulation limiting to a specified time, expiring on a given date, the right of promotion of an enlisted man who holds the certificate of eligibility provided by the act of July 30, 1892. 54.
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6. The fact that such eligible has become 30 years of age does not vacate his right to promotion under the act. *Ib.*
7. The Secretary of War is the regular constitutional organ of the President for the administration of the military establishment of the nation, and as such the rules and orders promulgated through him must be received as acts of the Executive, and binding upon all within the sphere of his legal and constitutional authority. *Ib.*
8. Subsequent to the examination of a candidate for promotion to a second lieutenancy under the act of July 30, 1892, and the awarding to him of a certificate of eligibility, he was found to be suffering from a constitutional disease, though he was only temporarily disabled. *Held*, He was entitled to all the benefits arising from such a certificate. 91.
9. The phrase "troops operating against an enemy," as used in section 7 of the act of April 26, 1898, was intended to apply to all instances where the troops of the United States are assembled into separate bodies, such as regiments, brigades, divisions, or corps, for the purpose of carrying on and bringing to a conclusion the war with Spain. 95.

ARMY—Continued.

10. If the operations of the troops are with the direct object of assisting in the military measures of the Government for subduing the forces of Spain they can be considered as operating against an enemy. *Ib.*
11. Any troops assembled at camps in the United States for the present war purposes can properly be considered as operating against an enemy. *Ib.*
12. The act of April 22, 1898, authorizing the organization of certain forces, with special qualifications, from the nation at large, not to exceed 3,000 men, contemplates such an organization of 3,000 men for the entire Army, and not the organization of such force under each call for volunteers. 161.
13. In the distribution of supplies to the destitute inhabitants of Cuba, the commanding officers may use either the officers of the Army or such volunteer agencies as may be available for the purpose. 190.
14. The resignation of a military office does not take effect until accepted by the proper superior authority. 237.
15. The ordnance and other stores belonging to the several States, taken or accepted by the Government for use in the war with Spain, should not be returned in kind, but should be paid for at the price agreed upon, or, in the absence of an agreement, what they were worth. 372.

See ARMY OFFICER; CANTEEN.

ARMY OFFICER.

1. An army officer detailed for duty in a clerical position can not be considered as a member of the "classified service," and after separation therefrom can not be reinstated therein by reason of his service during the war. 6.
2. The commission of the attorney-general of the State of South Dakota as an officer in the Volunteer Army is not vacated by reason of section 1222, Revised Statutes. 88.
3. While an officer in the volunteer army may be said to be actively engaged in the military service, he is not permanently engaged, and the Government does not need nor demand a complete and final severance of his relation with civil life. *Ib.*
4. The provision of section 1222 that no officer of the army on the active list shall hold any civil office, etc., applies only to regular army officers. *Ib.*
5. An army officer on the active list is one not only actively, but permanently engaged in the military service of the Government. *Ib.*
6. Although a soldier is primarily entitled to promotion to a lieutenancy by reason of a certificate of eligibility, if he is in fact disqualified to perform military service by reason of physical disability, this would operate to disbar him. 91.

ARMY OFFICER—Continued.

7. Vacancies of regimental and company officers occurring in organizations from the several States and Territories after their muster into the Volunteer Army of the United States, under the act of April 22, 1898, should be filled by commissions issued by the governors of the States or Territories to which the organizations belong. 109.
8. Regimental officers of such regiments as may be formed by contributions of companies from two or more States are to be appointed by the President, under the constitutional provisions which authorize him to appoint all officers of the United States whose appointment is not otherwise provided by law. 135.
9. The act of April 22, 1898, temporarily increasing the military establishment of the United States, in conferring the appointment of certain officers upon the governors of States when the members of a militia organization enlist in the Volunteer Army, confers such privileges only when a majority of the members of such organization enlist as a body. 146.
10. Under this act the appointment of the officers of a militia organization to corresponding grades in the Volunteer Army may be made even though the militia organization was formed subsequent to the call of the President for volunteers. *Ib.*
11. The term "officers" as used in this connection applies only to the commissioned officers. *Ib.*
12. Under this act, where a regiment or battalion is made up respectively of battalions or companies from two or more States, the governor of each State would be entitled to appoint the officers of the companies or battalions by them respectively contributed in a body. *Ib.*
13. If a battalion is made up of companies contributed by two or more States, the officers of the battalion as such must be appointed by the President. *Ib.*
14. The law fixes no age limit for officers in the Volunteer Army. 176.
15. An officer of the Regular Army, holding at the same time a commission in the Volunteer Army, may continue to hold and exercise his commission in the Volunteer Army after having been placed upon the retired list by reason of the age limit. 176, 199.
16. The act of June 20, 1882, relative to retirement, applies to an officer of the Regular Army who is 64 years of age, temporarily serving under a volunteer commission, without affecting his status in the volunteer service, but does not apply to a volunteer officer, not being in the Regular Army, who is 64 years of age. 199.
17. When an organization of State militia, with regimental and company officers bearing commissions from the governor of the State in which organized, is received as a body into the service of the United States, under the act of April 22, 1898, such officers

ARMY OFFICER—Continued.

- remain in their several grades until vacancies contemplated by the law occur, and can not be removed at will by such governor. 225, 536.
18. The acceptance by the commanding general of the National Guard of the District of Columbia of a commission as colonel in the Volunteer Army, for service in the war with Spain, did not operate as a vacation of the District command. 237.
 19. Officers exercising, under assignment in orders, a command above that pertaining to their grade in connection with the Army of the United States, if performing no other service of a domestic nature, but held in readiness to resume hostilities, are entitled to the increased pay and allowance provided for by the act of April 26, 1898. 258.
 20. The act of March 2, 1899, takes from the four principal assistants of the Quartermaster-General the rank of colonel, and the increased rank of the quartermaster on the staff of the Commanding General of the Army given by the act of July 7, 1898. 381.
 21. Upon the approval of the act of March 2, 1899, the Chief of the Record and Pension Division of the War Department became entitled to the increased rank and pay without the necessity of a nomination by the President and confirmation by the Senate. 480.
 22. Organizations of State militia, received as a body into the service of the United States as a part of the Volunteer Army under the act of April 22, 1898, are to be maintained as received, and the officers of the same are entitled to enter the service with the grades which their commissions severally indicate. 536.
 23. A regiment entering the military service of the United States has the right to maintain its organization with the number and grade of officers authorized by the laws of the State from which it came. *Ib.*
 24. An officer commissioned by the governor of a State to fill a vacancy as major occurring in such regiment in the field, need not be mustered into the service of the United States, he having originally been mustered into the service with the regiment as a captain. *Ib.*

ARREST.

1. The board bills of Chinese boys remaining at Richford, Vt., after they are, by authority of the Treasury Department, denied the privilege of coming into the United States, should not be paid by the United States pending their subsequent arrest by the United States marshal and a hearing thereafter under the Chinese exclusion act, as they are neither under detention nor arrest. 51.
2. Detention by an officer is in effect an arrest, and a person under detention or arrest must be furnished subsistence at the expense of the Government making the arrest. *Ib.*

ARREST—Continued.

3. The right of forest supervisors and rangers to arrest persons violating the laws or the rules and regulations for the protection of forest reservations being doubtful, it is suggested that relief must be had through Congressional action. 512.

See INTERNATIONAL LAW, 1, 2.

ASSIGNMENTS.

Section 3477, Revised Statutes, with reference to the assignment of claims, applies only to such claims as require allowance by some accounting officer, an ascertainment of the amounts due thereon, and the issue of a warrant for their payment. 637.

See CHECKS; RIVERS AND HARBORS.

ATTORNEY-GENERAL.

1. The question as to whether the parts of a vessel which a British subject proposes to take to Alaska by ocean steamer will be subject to duty, being a hypothetical one, is not answered. 77.
2. The Attorney-General is precluded from giving an opinion upon a matter not actually or presently arising in the administration of a Department. *Ib.*
3. He is not authorized to answer an inquiry made of the Treasury Department with reference to an increase in the amount of subsidiary silver coinage, whether regarded as an abstract question of law or an inquiry into the legality of the course of a predecessor in office in matters not now demanding official action. 85.
4. To authorize the expression of an opinion upon a question of law it is necessary that a statement of facts be submitted showing that the question has actually arisen in the administration of a Department in an existing case calling for action. *Ib.*
5. A question as to what course should be pursued by an Executive Department involves matters of fact upon which the Attorney-General may not have knowledge, and considerations of expediency upon which it is not for him to pass judgment. 98.
6. The Attorney-General can not undertake to settle conflicting questions of fact raised by various papers presented, but will look to the submitted statement of facts alone. 156.
7. The question whether a proceeding under any law would or would not be successful is a judicial question on which it is not necessary or proper for the Attorney-General to give an official opinion. 181.
8. The facts submitted failing to raise the question of the legal status of the Revenue-Cutter Service, additional information is requested. 189.
9. In a request for an opinion the facts must be definitely formulated and clearly stated by the person asking the opinion. The Attorney-General can not be required to extract a finding of facts from correspondence or reports. 342, 498.

ATTORNEY-GENERAL—Continued.

10. The Attorney-General will not exercise appellate jurisdiction over a decision of one of the Executive Departments upon mixed questions of law and fact. 342.
11. In the request for an opinion the particular question of law on which his advice is desired should be specifically formulated, and the facts which exist or are assumed as the basis of such question should also be definitely stated. 351.
12. In certain cases it may be proper to gather the circumstances from the papers presented, and to waive the customary rule of the Department requiring a definite statement of the facts upon which an opinion is requested, as where governmental transactions are involved, and there are no disputed facts. 477.
13. On questions of disbursements of money or payment of claims the Attorney-General should not render opinions. 581.
14. Under the primary, broad, and general control of the Attorney-General of suits in which the United States is interested, he is authorized to make such disposition of pending litigation, including the compromise of cases of forfeiture, as seems to him meet and proper. 491.
15. He may dismiss or discontinue suits in which the Government is interested; *a fortiori*, he may terminate the same upon terms, at any stage, by way of compromise or settlement. 491.

BAGGAGE RECEIPT.

An excess-baggage receipt issued by a railroad company to a passenger for excess weight of baggage does not require a stamp under the war-revenue law. 246.

BAILMENT.

A warehouseman is interested in the joint custody with the Government of property in his care, by reason of his risks, his storage, and his contractual relations. 152.

BANKS.

1. The term "surplus," as applied to banks, includes not only the amount set apart as a minimum surplus, but also such amount as has been set apart by a vote of the directors or other authorized action of the bank to strengthen the capital, and is thus held out to the public as a part of its banking capital. 320.
2. The surplus required to be set apart by the national banking act from the net proceeds until it reaches an amount equal to 20 per cent of the capital stock becomes by law in effect a part of the bank's capital. *Ib.*
3. The undivided profits of a bank are not surplus, and can not be estimated under the war-revenue act as a part of the bank surplus. *Ib.*
4. The capital of a bank and other funds belonging to it which, by law or the action of the bank authorities, assume the character

BANKS—Continued.

- of capital, and which the bank uses in carrying on its business, is what the law has in view as the subject of taxation. *Ib.*
- 5. State banks are taxable upon the amount of their capital, together with such additional surplus or funds belonging to them as may be set apart either by law or by the action of the bank authorities and used in carrying on the general business of the bank. *Ib.*
- 6. The use by State banks of the word "international" as a portion of their name or title is not in violation of section 5243, Revised Statutes. 475.

BERING SEA.

See SEAL FISHERIES.

BERTHS.

See NAVIGATION LAWS, 2.

BIDS.

- 1. A bid in which the name of the firm is signed by typewriter, followed by the signature of the only member of the firm, is, before acceptance, modified by telegram. *Held*, The modified bid, upon acceptance before withdrawal, would bind the bidder. 45.
 - 2. While it is customary to confirm by letter a telegraphic proposition, such confirmation is not essential. *Ib.*
- See CONTRACTS.

BILL OF LADING.

- 1. The bill of lading, manifest, or receipt issued to the consignor by the United States Express Company, when receiving money and securities for transportation under its contract with the Government, must have attached a revenue stamp duly canceled. 192.
- 2. Money and merchandise carried by the Adams Express Company for the Pennsylvania Railroad Company over the lines of the latter, free of charge, under a contract between the two companies, do not require a bill of lading or manifest under the provisions of the war-revenue law, and, if given, it is not liable to a stamp tax. 252.

BOARD OF GENERAL APPRAISERS.

The Board of General Appraisers was warranted in refusing to hear and pass upon a question whether an importer was justified in refusing to answer interrogatories under the act of June 10, 1890, submitted to them in reappraisement proceedings. 456.

BONDS.

- 1. Bonds provided for in a mortgage, to be issued or not as the future action of the mortgageor may determine, are not until issued the subject of taxation or an element in estimating the amount of stamps required for the mortgage. 531.

BONDS—Continued.

2. A bond, though prepared and signed, still in the possession of the obligor unissued, and which may never be, is not a debt or obligation which is liable to taxation. *Ib.*
3. As only one stamp is required upon two separate papers which constitute one transaction, as where a bond or note is given to evidence a debt and the mortgage executed to secure the same, the purposes of the law are fulfilled when the stamp in proper amount is affixed to either and canceled, such stamp being the highest rate required by said papers or either of them. *Ib.*
4. The five years' limitation within which suits may be brought upon the official bonds of disbursing officers begins to run from the time the accounting officers of the Treasury make the statement of the account showing an indebtedness to the United States. 611.
See SURETY COMPANIES.

BONUS.

See NORTH AMERICAN COMMERCIAL COMPANY.

BOOK.

See COPYRIGHTS, 1, 2, 5.

BOUNTY.

1. Proceedings for adjudication of bounty for the capture or destruction of a vessel may be begun at the instance of the Secretary of the Navy in any district that he may designate, and upon his failure to make such designation within three months after the vessel has been captured or destroyed, the claimants may institute proceedings. 205.
2. In determining questions with reference to bounty arising under section 4635, Revised Statutes, the Secretary of the Navy is authorized: (1) To institute proceedings under a libel of information in a district court of the United States, sitting as a prize court; (2) to submit the case to the Court of Claims; (3) to proceed to determine the question arising, and award the bounty. *Ib.*
3. The Court of Claims has authority to hear and determine such questions of bounty, either as a claim founded upon a law of Congress, or as one which may be transmitted to it by the head of a department, under section 1063, Revised Statutes, and the act of March 3, 1887. 205.

See PRIZE.

BRIDGES.

1. The Mississippi River in Minnesota, both above and below the Falls of St. Anthony, is a navigable river, not wholly within the limits of any particular State, and can not be bridged without the permission of the United States. 52.
2. The Lehigh Valley Railroad Co. may close its drawbridge over the Passaic River for repairs. 312.

BRIDGES—Continued.

3. The Secretary of War would not be prohibited from approving the plan and location of a bridge across boundary waters if acts of authorization were passed by the legislatures of the States interested. 332.
4. The act of September 19, 1890, is not sufficient warrant to the Secretary of War for requiring changes to be made in the bridge of the Baltimore and Ohio Railroad Company over the Ohio River at the expense of the owner without compensation. 343.
5. If the company itself voluntarily prostrates its bridge, with the intention of constructing another in its place, the Secretary of War has the right to prescribe conditions as to height, length of span, etc. *Ib.*

BRUNSWICK HARBOR.

See RIVERS AND HARBORS, 4-6.

BUILDING REGULATIONS.

See DISTRICT OF COLUMBIA, 1, 2.

BULLETINS.

See DEPARTMENT OF AGRICULTURE, 2.

BUREAU OF ENGRAVING AND PRINTING.

The Bureau of Engraving and Printing may compete for the work of engraving and printing United States postage stamps. 40.

BUREAU OF YARDS AND DOCKS, NAVY.

An officer of the Corps of Engineers not below the relative rank of captain is eligible for appointment as Chief of the Bureau of Yards and Docks. 47.

CABLES.

1. No one has a right to land a foreign cable upon our shores and establish a physical connection between our territory and that of a foreign state without the consent of the Government. 13.
2. The President has the power, in the absence of legislation by Congress, to control the landing of foreign submarine cables on the shores of the United States. *Ib.*
3. If a landing has been effected without the consent or against the protest of this Government, respect for its rights and compliance with its terms may be enforced by applying the prohibition to the operation of the line, unless the necessary conditions are accepted and observed. *Ib.*
4. There is no ground to support the claim for indemnity of the British Eastern Extension Australasia and China Telegraph Company for cutting the cable at Manila during the war with Spain. 315.
5. The application of the Commercial Cable Company for leave to land its cable in the United States is within the jurisdiction and control of the Department of State, acting for the President. 408.

CABLES—Continued.

6. The grounding of a cable upon the soil of the United States, with the intention of connecting our territory with foreign territory by that means, is a matter which is under the sovereign control of the Government. *Ib.*
7. So far as the landing of a cable in the island of Cuba is concerned, the subject is under the control of the War Department, by reason of the fact that its occupation is that of a military nature. *Ib.*
8. Owing to the temporary nature of the occupation of the island of Cuba by the United States, it is inexpedient to grant permission to the Commercial Cable Company to land a cable upon its soil. *Ib.*
9. The authorities of the United States have full power, in their discretion, to prevent the grounding of a cable intended to connect the island of Cuba with the United States or any other country, or to prevent or disrupt any cable which may be laid in disregard of its instructions and against its will. 514.
10. The grounding of a cable upon the soil of the United States, with the intention of connecting our territory with foreign territory by that means, is a matter which is under the sovereign control of the Government, to be exercised by Congress, but in the absence of Congressional action to be regulated and controlled by the executive department of the Government. *Ib.*
11. There is no objection to submitting to Congress the claims of the British Cuba Submarine Telegraph Company for damages by our vessels occurring during the hostilities with Spain. 654.

CALIFORNIA DÉBRIS COMMISSION.

The superior court of Sutter County, Cal., granted a temporary injunction on a suit by the county of Sutter, restraining the Red Dog Mining Company, which was operating under a license from the California Débris Commission, from mining by the hydraulic process. *Held*, In the absence of any question touching the validity of the powers granted to the California Débris Commission, the Government should not intervene in the suit. 554.

“CALL.”

A writing termed a “call,” in which the signer agrees to sell the stock described in the paper at the price named, provided the holder of the paper calls upon him within the time specified, is taxable under the first paragraph of Schedule A of the war-revenue law. 447.

CANALS.

1. Canals being artificial waterways or means of commercial transportation, as well as natural lakes and rivers, the same principles may be applied to them that are applied to bridges, turnpikes, streets, and railroads. 332.

CANALS—Continued.

2. Consent having been given for the construction of a canal wholly within the State of Texas, there is no reason for the withdrawal of such permission. *Ib.*

CANTEEN.

1. Section 17 of the act of March 2, 1899, does not prohibit the sale of intoxicating drinks through the canteen section of the post exchange by parties other than officers and private soldiers. 426.
2. No officer or private soldier can be detailed in the canteen section to sell intoxicating drinks, either directly or indirectly. *Ib.*
3. A license or permission can not be given by the commanding officer to a private person to enter a military reservation for the purpose of selling intoxicating drinks. *Ib.*

CARTER COURT-MARTIAL.

See COURT-MARTIAL, 4-8.

CENSUS BUREAU.

1. The expenditures authorized by the act of 1899, and incurred by the Director of the Census, are proper and lawful, and the Secretary of the Interior should approve them, if it is his duty to do so at all, as a ministerial act, and not as one in which he is to exercise judgment or discretion touching the wisdom or advisability of the expenditure. 413.
2. The Secretary of the Interior is not required to approve the selection of appointees, the plan for taking the census, or for making contracts for supplies, etc. *Ib.*
3. By section 2 of the act of March 3, 1899, the Census Bureau is made a part of the Interior Department, and as such its accounts are subject to such rules and regulations as the Secretary may prescribe. *Ib.*
4. The Director of the Census and his subordinates are not subject to the supervision, control, or direction of the Secretary of the Interior. *Ib.*
5. The appointment of subordinate officials and employees of the Census Bureau is within the power and discretion of the Director of the Census. *Ib.*

CENTRAL BRANCH, UNION PACIFIC RAILROAD.

See UNION PACIFIC RAILROAD, 2-4.

CERTIFICATES.

Stamps should be affixed to certificates or other instruments issued for private use prior to their delivery, to be furnished by the party applying therefor. 134.

See ARMY, 4-8; CHINESE, 2-7, 10, 13, 14, 20.

CHARTER PARTIES.

1. The paragraph of the war-revenue act of June 13, 1898, relating to charter parties does not apply to vessels engaged in domestic

CHARTER PARTIES—Continued.

- commerce, as the law does not require that their tonnage should be registered. 168.
2. The paragraph under the head of "Charter party" in the war-revenue law applies to all vessels registered under the provisions of Title XLVIII, Revised Statutes, and does not apply to vessels enrolled or licensed under Title L. 270.
 3. The charter parties of registered vessels sailing between the Atlantic and Pacific coasts of the United States in the coasting trade are to be stamped. *Ib.*

CHECKS.

1. Checks or drafts issued by the disbursing officers of the United States upon Government funds on deposit, in payment of its obligations or dues, are exempt from the stamp tax. 134.
2. Rebate checks given by a railroad company to passengers who purchase their tickets from the conductor aboard the train are not liable to a stamp tax. 248.
3. Checks of disbursing officers drawn upon the public Treasury or an assistant treasurer of the United States may be properly indorsed and transferred by either the payee, indorsee, or by an agent of either, acting as such under a power of attorney from such payee or indorsee. 637.

CHEMICALS.

See MEDICINAL DRUGS.

CHICAGO.

The authorities of the city of Chicago have no legal power to prohibit the Government contractors from dumping material dredged from the harbor at Chicago within the limits selected and designed by the Secretary of War, in accordance with the authority conferred upon him by law. 646.

CHINESE.

1. The board bills of Chinese boys remaining at Richford, Vt., after they are denied the privilege of coming into the United States, should not be paid by the United States pending their subsequent arrest by the United States marshal and a hearing thereafter under the Chinese exclusion act, as they are neither under detention nor arrest. 51.
2. Chinese certificates visé by the British consul at Havana during the absence of the United States consular officers may be accepted by the authorities of the United States, provided this duty is voluntarily performed by such officer with the consent of the British Government. 72.
3. Certificates issued to Chinese persons of the exempted class by the Chinese consul at Havana, in the absence of certification by a consular officer of the United States, should not be accepted by the customs officials of the United States. *Ib.*

CHINESE—Continued.

4. The return certificate contemplated by Article II of the treaty of 1894 with China must be accompanied by a certificate as to the facts, made by the Chinese consul at the port of departure. *Ib.*
5. Chinese applicants for admission to the United States should comply strictly with the requirements as to certificates. 72, 130, 608.
6. The original entry certificates of Chinese merchants and others exempted must be issued by their Government or the Government where they last reside. 72, 201.
7. Chinese persons known as traders are not entitled to admission to the United States for the first time upon presenting a certificate in accordance with the requirements of the act of July 5, 1884. 130.
8. A trader is not expressly known to the law as among the exempt classes, nor is such a person fairly included in them as a merchant, and the statutory language can not be so construed. 130, 260.
9. The true theory of the Federal law is not that all Chinese persons may enter this country who are not forbidden, but that only those are entitled to enter who are expressly allowed. 130.
10. Privileged Chinese subjects resident within a foreign jurisdiction, in order to gain admission into the United States, must have a certificate issued by the foreign Government and not by the officials of China. 201.
11. The restrictions placed upon the admission to the United States of Chinese persons of the exempt class, and the regulations affecting the departure and return to this country of registered Chinese laborers, are to be held applicable to Chinese persons applying for admission to the Hawaiian Islands or to such persons residing there who may wish to depart with the intention of returning. 249.
12. A Chinese person not connected with the diplomatic service is not entitled to admission to the United States unless an official, teacher, student, merchant, or traveler for curiosity or pleasure. 260.
13. The status of a valid wife and her relation to her husband fairly embracing her with him in the permitted classes, if she is not in fact a laborer, does not extend so far as to confer upon her immunity from the certificate requirement to which her husband is entitled, because of his having acquired a domicile here. *Ib.*
14. The wife is a distinct Chinese individual, and since all Chinese persons of the privileged classes must produce upon their original entry the prescribed certificate, the wife of a merchant must in any case produce that certificate upon her original entry. *Ib.*
15. A Chinese proprietor of a restaurant was duly classified as a merchant, and obtained the necessary certificate entitling him to reenter the United States. At the time of his return to this country such persons were deemed laborers, and he was refused

CHINESE—Continued.

- admission. *Held*, That the Department should in fairness recognize him as a merchant and admit him. 324.
16. The authority vested in the Secretary of the Treasury to determine finally and conclusively whether or not a Chinese person shall be admitted to this country, may be exercised in such manner as will keep faith and do no injustice to a Chinese who seeks to return. *Ib*.
 17. An appeal by a Chinese person, taken under section 13 of the act of September 13, 1888, to a judge of a district court, from the judgment of the Commissioner, does not vacate, but merely suspends, the judgment of the Commissioner and proceedings thereunder until the appeal is dismissed. 340.
 18. The Secretary of the Treasury has authority to admit to the Hawaiian Islands such Chinese persons as departed therefrom under regulations of the existing government allowing them to return, as they are not excluded by the extension to the islands of the law and regulations now operative within the United States. 353.
 19. Congress has power to exclude aliens altogether from the United States or to prescribe the terms and conditions on which they may come into this country. *Ib*.
 20. Certain Chinese subjects, who were bona fide merchants, were refused admission into the United States on the ground that the nature and character of their business, plainly specified in the Chinese portion of the certificates issued by the representatives of the Chinese Government, was not stated in the English translation of the certificate accompanying the same. *Held*, The collector was justified in refusing permission to land. 608.

CIVIL SERVICE.

1. An army officer detailed for duty in a clerical position can not be considered as a member of the "classified service," and after separation therefrom can not be reinstated therein under Rule IX, by reason of his service during the war. 6.
2. The volunteer pension branch of the War Department was not within the classified service, and the fact that said branch was merged into the Record and Pension Division of that Department, which is now under the civil service, would not bring positions in it within the classified service. *Ib*.
3. The officers and employees of the District of Columbia are as distinct from the civil service of the United States as would be the officers of any civil government in one of the States of the Union from the civil service of the State itself. 59.
4. The Civil Service Commission is not attached in anywise to any of the Executive Departments, nor is it subject in anywise to the control of any of the heads of such Departments. 62.

CIVIL SERVICE—Continued.

5. Section 7 of the act of March 15, 1898, requiring of clerks not less than seven hours labor a day, does not apply to the Civil Service Commission or to its clerks or employees. *Ib.*
6. The amendment of the civil-service rules of May 29, 1899, authorizing the permanent employment of persons serving under temporary appointments, was intended to apply only to such persons as were serving under temporary appointments pursuant to Rule VIII, and such amendment does not comprehend temporary appointments made under the act of July 1, 1898. 556.
7. An appointment by the Secretary of State, without reference to or conformity with the regulations prescribed for appointments in the classified service, made pursuant to the act of July 3, 1898, authorizing the temporary employment of stenographers and typewriters in his Department, is lawful. *Ib.*
8. When free delivery is discontinued at a post-office such office ceases to be under the civil-service rules. 613.
9. In the exercise of his discretion the Postmaster-General abolished the free-delivery service at Huron, S. Dak., on January 15, 1895, and in consequence certain carriers were separated from the service. *Held*, That on the reestablishment of free-delivery service at that place the former carriers could not be reinstated under Rule IX of the civil-service rules. 663.
10. To entitle a person to reinstatement in the civil service under Rule IX, by reason of the reduction of force, such reduction must be one required by law and not one caused by the exercise of a discretionary power vested in an executive officer. *Ib.*

CLAIMS.

1. Where a judgment recovered against the United States in the Court of Claims has been paid, and is subsequently set aside on the ground of fraud, the money can be recovered, if at all, because of the fraud and not because it is property or proceeds thereof belonging to the United States. 411.
2. The Secretary of the Treasury has no authority under section 3755, Revised Statutes, to enter into a contract with a private individual for the collection of such money. *Ib.*
3. A claim being one upon which suit might have been originally commenced in the Court of Claims by the voluntary action of the claimant, is not covered by the proviso to section 1063, Revised Statutes. 424.
4. Certain claims against Hawaii which accrued prior to the annexation should be presented to, considered, and paid by the Hawaiian government, but they should first be received by the Department of State, and then transmitted to the government of Hawaii for adjustment. 583.

CLAIMS—Continued.

5. Citizens of the United States may present their claims against the Hawaiian government, or take such other proceedings in court as the municipal laws of Hawaii will allow. *Id.*
6. Such questions as here involved may properly be submitted to the Court of Claims. *Id.*
7. Section 3477, Revised Statutes, with reference to the assignment of claims, applies only to such claims as require allowance by some accounting officer, an ascertainment of the amounts due thereon, and the issue of a warrant for their payment. 637.

See PRIZE.

COLUMBIA INSTITUTION FOR THE DEAF AND DUMB.

The Columbia Institution for the Deaf and Dumb is in the Department of the Interior, so as to make the provisions of section 3709, Revised Statutes, applicable to it in making purchases and contracts for supplies or services. 1.

COMMERCE.

1. Commerce is not restricted to the purchase, sale, and barter of commodities, but includes navigation, intercourse, and the reception and transportation and delivery of passengers and freight by land and water, and also the means or instrumentalities used in such commerce. 501, 646.
2. The power of the United States to regulate commerce includes the right to regulate the use of all the means and instrumentalities used in commerce, whether on sea, river, harbor, or land, and entirely irrespective of whether a State has attempted to regulate the same matter or not. 646.
3. Whenever Congress in the exercise of its power to regulate commerce makes any rule or regulation in harbors or elsewhere, whether in establishing harbor lines or otherwise, such regulations necessarily supersede any that the State may have made on the same subject within its limits. 501.
4. The regulation of commerce and navigation being entirely within the control of Congress, there is no authority for an Executive Department to make or enforce rules or regulations relative to the registry of vessels or kindred matters connected with such subjects. 566.

See CONSTITUTIONAL LAW, 8, 9, 11.

COMPENSATION.

See CONSULAR SERVICE, 1-3; OFFICE, 1.

COMPTROLLER OF THE TREASURY.

1. A question with reference to the manner of drawing funds from the Treasury, and the administrative examination of the accounts of the officer disbursing them, is one which should be submitted to the Comptroller of the Treasury. 413.
2. The decision of the Comptroller of the Treasury upon any question involving a payment is final and binding. 581.

CONCESSIONS.

1. The United States Government is not the successor of the Government of Spain in Cuba, but merely an intervening power arranging the succession, and as such it can not be held to have assumed the obligations arising from or growing out of concessions granted or contracts entered into by the Spanish Government in Cuba previous to its surrender of sovereignty therein. 384.
2. Any money that might be derived by the commissioner-general of the Paris Exposition through the granting of concessions or the sale of a catalogue belongs to the United States, and should be turned into the Treasury. 388.
3. A concession in due form to construct certain tramways in the city of Havana was granted to one De la Torre in 1892, notwithstanding the objection of a rival company, who claimed the right under a royal decree. Subsequently, the same concession was advertised at public auction and sold to De la Torre, the rival company failing to bid. *Held*, The owners of the De la Torre concession have a prima facie right to proceed at their own risk under the permission of the municipal authorities. 520.
4. The military order of December 24, 1898, forbidding the making of any grant or concession in the future, was not intended to apply to those previously made in due form. *Ib*.
5. Neither the President nor the War Department has power to grant a concession of the right to use the water power of the River Plata in Porto Rico. 546.
6. If in the grant of a right or privilege the sovereign has retained any authority which may affect its untrammelled exercise and enjoyment, such right is inchoate, and can be exercised only by the grace of the succeeding sovereign. *Ib*.
7. If inchoate rights or grants made by a municipal body in Cuba, under Spanish sovereignty, require for their completion the assent or approval of the Crown, or its officers, the absence of such assent or approval prior to the treaty of cession renders them ineffective and incomplete. 526.
8. A concession for the construction of a certain electric tramway in Puerto Rico being inchoate and incomplete, and lacking certain public action necessary to be taken by the public authorities representing the Crown of Spain before it could go into effect as a complete grant, the War Department has no authority to grant or complete such concession. 551.

See also LICENSE.

CONFISCATION.

The military government of the United States at Manila should return to certain claimants all property and possessions taken from them by the United States in pursuance of the order of General Otis of November 25, 1898. 351.

See also FORFEITURE.

CONSPIRACY.

1. In conspiracy cases, proof of the acts and declarations of the alleged conspirators may be introduced, although not properly admissible at the time, because community of intent and design had not been established; but if received, the error may be cured by the subsequent introduction of proof of the conspiracy existing at the time the alleged declarations were made. 589.
2. Testimony tending to show such a relation or understanding between alleged conspirators as indicates a purpose to defraud the Government by means of contracts for public works to be given out and carried on under charge of the accused is admissible, even though it relates to matters antedating the time of the particular conspiracy charged. *Id.*

CONSTITUTIONAL LAW.

1. The jurisdiction of this nation within its own territory is necessarily exclusive and absolute, and is susceptible of no limitation not imposed by itself. 13.
2. No one has a right to land a foreign cable upon our shores and establish a physical connection between our territory and that of a foreign State without the consent of the Government of the United States. *Id.*
3. Congress has no power by legislation to abridge the effect of the President's pardon. 36.
4. When property is of trifling value, and its destruction is necessary to effect the object of a valid law, it is within the power of the legislature to order its summary destruction without obtaining a forfeiture by judicial proceedings. 70.
5. The constitutional requirement with reference to uniformity in the imposition of taxes, imposts, etc., is satisfied when a particular impost is uniform upon all subjects of the same kind or class. 192.
6. The provision of the Federal Constitution forbidding the impairment of contracts applies only to the States and not to acts of Congress. *Id.*
7. Congress can not delegate its legislative power so as to authorize an administrative officer, by the adoption of regulations, to create an offense and prescribe its punishment. 266.
8. Under the power conferred upon Congress by the Constitution to regulate commerce, the United States has the right to control all structures and works which interfere in any manner with the navigable capacity of the waters of the United States which, either by themselves or in connection with other waters, form channels for interstate commerce. 332.
9. The absolute power of Congress to regulate commerce includes the power to regulate the use of all means and instrumentalities used in commerce, whether on sea, rivers, and lakes, in harbors or on land, irrespective of whether a State has attempted to regulate the same matter or not. 501, 646.

CONSTITUTIONAL LAW—Continued.

10. The grounding of a cable upon the soil of the United States, with the intention of connecting our territory with foreign territory by that means, is a matter which is under the sovereign control of the Government, to be exercised by Congress, but in the absence of Congressional action to be regulated and controlled by the executive department of the Government. 408, 514.
11. The power of the United States to regulate commerce is general, absolute, and without limit, either as to the time, place, or detail of its exercise, except as to waters whose entire navigability for commerce is limited to the confines of a single State. 646.

CONSULAR SERVICE.

1. Section 1703, Revised Statutes, allows consular agents all the fees collected, unless there is an order to the contrary limiting the compensation to a part only of the fees received, in which event the residue is added to the income of the principal consular officer. 163.
2. There is no limitation upon the amount which the agent and the principal officer together shall receive in case the President makes an order for a partition of the fees. *Ib.*
3. Consular agents are entitled to retain a sum not to exceed \$1,000 annually out of the fees received by them, and the residue is to be paid to and retained by the principal consul, unless such residue, together with similar fees received from other consular agencies or vice-consulates in his territory, does not exceed \$1,000 a year. *Ib.*
4. The master of an American steamship requested the discharge of a seaman, the latter joining in the request. The log book showed that the sailor refused to work, alleging sickness, which proved to be intoxication. For these reasons the master deducted certain pay from his wages. *Held*, The consul-general was justified in discharging the seaman. 212.
5. If a seaman is discharged because of unusual or cruel treatment, he is entitled to the extra wages allowed by law, and in such cases the consul-general is authorized to exercise some reasonable discretion in determining this extra allowance, in reference to actual or anticipated ill treatment. *Ib.*

CONTAGIOUS DISEASES.

1. If the President is satisfied that cholera, yellow fever, smallpox, or plague exists in this country, and that it is necessary, in order to prevent its spread, to adopt and enforce certain rules and regulations, he has authority to do so under the act of March 27, 1890. 106.
2. Alien immigrants pronounced by competent authority to be suffering from a loathsome or dangerous contagious disease are not entitled to enter the United States. 122.

CONTAGIOUS DISEASES—Continued.

3. The Secretary of Agriculture may slaughter such sheep as are adjudged to be infected with a contagious disease or exposed to infection, and in making the compensation provided by law he is limited to those which were exposed to infection but not then infected. 390.

CONTRACT LABOR.

1. Certain natives of the Philippine Islands, not being professional actors, artists, or singers, within the meaning of the contract-labor law, are properly excluded, unless on other grounds they may be regarded as not within its prohibition. 495.
2. As the claim of these aliens for admission appears meritorious and no possible competition with American labor will be involved, and as they will be returned to their country in due time, there is no conclusive objection to the Secretary of the Treasury exercising his favorable administrative discretion in admitting them. *Ib.*
3. The law does not necessarily exclude all persons who are not manual laborers and who otherwise do not come within its express exceptions. *Ib.*

CONTRACTS.

1. Contracts for supplies or services in any of the Departments of the Government, except for personal services, or when the public exigency requires the same immediately, must be made after advertisement for proposals in accordance with section 3709, Revised Statutes. 1.
2. The Columbia Institution for the Deaf and Dumb is in the Department of the Interior, so as to make the provisions of section 3709, Revised Statutes, applicable to it in making purchases and contracts for supplies or services. *Ib.*
3. The Postmaster-General should advertise for proposals for the work of engraving and printing United States postage stamps, for which work the Bureau of Engraving and Printing may be permitted to compete. 40.
4. A bid in which the name of the firm is signed by typewriter, followed by the signature of the only member of the firm, is, before acceptance, modified by telegram. *Held*, The modified bid, upon acceptance before withdrawal, would bind the bidder. 45.
5. A bidder under an advertisement for sealed proposals has the right, previous to the opening of the bids, to modify his bid by telegram, and when so modified, upon acceptance before withdrawal, will bind the bidder. *Ib.*
6. While it is customary to confirm by letter a telegraphic proposition, such confirmation is not essential. *Ib.*
7. The contract for the construction of gun emplacements on Tybee Island, Georgia, is a formal written contract, and as such merges

CONTRACTS—Continued.

- all previous negotiations, and is presumed to express without any uncertainty the final understanding of the parties, and antecedent conversations of previous or contemporary oral agreements regarding it are strictly inadmissible. 98.
8. Where a contract is duly executed and approved, and the advertisements and specifications are in terms made a part thereof, as in this case, these papers constitute the contract and resort can not be had *aliunde*. If the proposal as accepted is not attached and made a part thereof in fact, it ought at least, in order to be regarded, be identified and included by appropriate reference. 98.
 9. When a writing upon its face is couched in terms importing a complete legal engagement, without any uncertainty as to its object or extent, it will be conclusively presumed that the whole engagement was reduced to writing. *Ib.*
 10. In the case of a contract entered into by correspondence, the whole of it must be considered, and both parties must assent to a provision or condition before either is bound. *Ib.*
 11. While it has been held in some instances that proposals duly accepted without formal agreement may constitute a contract, this is not the case with contracts for public works and other contracts under section 3477, Revised Statutes. *Ib.*
 12. The Government should not construe a contract between third parties or between their contractor and others, or judicially determine the respective rights under such a contract merely for the reason that its terms relate to a Government undertaking. 156.
 13. The word "assigns" in the river and harbor acts of 1894 and 1896 is intended to point out the party or parties who took by formal assignment all rights to or interest in a contract, or such measure of rights and interest as carve out a complete share in the undertaking itself, with all its risks and incidents. *Ib.*
 14. Where money is due and payable on a contract at a specific time and is withheld, the creditor is entitled to demand and receive interest at the rate prevailing in the forum where suit is brought, except as against the Government of the United States and sovereign States. 172.
 15. When the Government enters into an agreement with a citizen it is not acting in its capacity of a sovereign, but places itself on the level with an ordinary individual, and its contracts have the same meaning as those between private persons. 192.
 16. The provision of the Federal Constitution forbidding the impairment of contracts applies only to the States and not to acts of Congress. *Ib.*
 17. So long as a contractor is taxed uniformly with all others in the same line of business, upon the same transactions, and the tax is levied for proper objects of taxation, he can not complain

CONTRACTS—Continued.

- merely because his compensation or profits under his contract with the Government are thereby indirectly reduced. *Ib.*
18. The question whether the claims of a certain company relating to the performance of a contract entered into with the city of Havana are sufficiently complete to constitute a contractual relation, and whether they ought to be ultimately recognized and confirmed is such as should be left to the decision of the authorities of Havana. 310.
 19. A claim for profits and expense incurred in the construction of a pier in the Aqueduct Bridge, Georgetown, D. C., under a contract which was annulled for lack of diligence in prosecuting the work, involves disputed facts and possibly controverted questions of law, and is properly referable to the Court of Claims under the first clause of section 1063, Revised Statutes. 424.
 20. Pursuant to a contract entered into by the Secretary of War with certain contractors for the transportation of supplies for the relief of destitute people in the Yukon River region, the contractors made the necessary preparations, incurring a large expense. The expedition was subsequently abandoned. *Held*, The Secretary of War has power to settle and pay the claims of the contractors out of the appropriation made for such relief. 437.
 21. The Secretary of War had the right to abandon this contract and decline to perform it if he deemed that the public interests so required. *Ib.*
 22. If the Government had ascertained that the contractors were not and could not be ready to transport the supplies within the time agreed upon, it could have treated that as a default and rescinded the contract; but in such case those facts must be shown to have existed. *Ib.*
 23. A party may abandon, fail, or refuse to perform his contract, but its obligations still continue, although at law there may be no means for their enforcement. *Ib.*
 24. Unless authorized by Congress the head of a Department has no power to adjust and pay claims for unliquidated damages, even when arising from the breach of a contract, except where such claims are for work and labor done or materials furnished under a contract silent as to the price and the amount thereof unliquidated. *Ib.*
 25. Under a contract for the construction of a certain gun, 85 per cent of the sum appropriated was to be paid as the work progressed and the remainder upon its completion and test. The gun was completed and stood the regular proof test, but upon being subjected to a further test it was destroyed. *Held*, That the contractor was entitled to the final payment. 465.
 26. The commissioner-general of the Paris Exposition has no authority to let a contract for printing and publishing a catalogue of the United States exhibit, etc., in which the contractor is to

CONTRACTS—Continued.

receive no money from the United States, but is to derive his compensation from the proceeds of the sale of the catalogue and the insertion of advertisements therein. 388.

27. The Secretary of the Treasury has no authority under section 3755, Revised Statutes, to enter into a contract with a private individual for the collection of money fraudulently obtained of the Government. 411.

COPYRIGHTS.

1. Music books made up in part of musical compositions copyrighted in the United States are prohibited importation. 29.
2. The term "book," as construed by the courts under the copyright laws, includes a musical or other composition, though printed on but one sheet. *Ib.*
3. The importation of reprints of musical compositions copyrighted in the United States is prohibited. *Ib.*
4. An article which is prohibited importation can not gain admission through being attached to an article which is not prohibited. *Ib.*
5. The Secretary of the Treasury and the Postmaster-General, in making and enforcing rules and regulations with reference to the importation of music and music books in violation of copyright laws, may provide for their summary destruction without notice. 70.
6. When Cuba, Porto Rico, and the Philippine Islands have been duly ceded to the United States their respective inhabitants will not be entitled to the benefits of the copyright laws unless the treaty by its terms confers such right, or Congress shall extend such laws to the inhabitants of those countries. 288.
7. So long as a state of war exists between Spain and the United States Spanish subjects have no right to the privilege of copyright conferred upon Spanish citizens by proclamation prior to the declaration of war. *Ib.*
8. The inhabitants of Hawaii, in the absence of affirmative legislation by Congress to that effect, are not entitled to the benefit of the United States copyright laws. *Ib.*

CORPORATIONS.

A corporation is liable for the acts of its officers, agents, or servants done by its authority, and for every wrong it commits, or for quasi-criminal acts; and in such case the doctrine of *ultra vires* has no application. 122.

COURT-MARTIAL.

1. Trial by a court not legally constituted is not a trial which can be said to be "due process of law." 137.
2. The consent of the accused can not confer jurisdiction upon a court not possessing it by virtue of statutory authority. *Ib.*
3. The conviction by a general court-martial properly called can not be ratified or confirmed by the Secretary of the Navy where

COURT-MARTIAL—Continued.

one member of the court has been relieved by a subordinate without authority of the Secretary and another judge substituted in his stead. *Ib.*

4. The court-martial that tried Captain Carter was justified in its finding of guilty upon the charges and specifications relating to the contracts of September, 1896, and the finding and sentence of the court with respect thereto should be approved. 589.
5. In the absence of any error of the court in the admission or rejection of testimony as would work or was liable to work injury to Captain Carter, there is no reason on these grounds to disturb the findings of the court. *Ib.*
6. The evidence failing to show satisfactorily fraudulent knowledge and purpose on the part of Captain Carter with reference to certain minor specifications of offense upon which he was found guilty by the court-martial, he should have been acquitted on that ground as to these charges. *Ib.*
7. Testimony tending to show such a relation or understanding between alleged conspirators as would be indicative of a purpose to defraud the Government by means of contracts for public works to be given out and carried on under charge of the accused would be admissible even though it related to matters antedating the time of the particular conspiracy charged. *Ib.*
8. There is no objection to the joinder of separate and incongruous charges in the same prosecution before a court-martial, such as is permitted by military usage and procedure. *Ib.*

COURT OF CLAIMS.

1. In determining questions with reference to bounty arising under section 4635, Revised Statutes, the Secretary of the Navy is authorized: (1) To institute proceedings under a libel of information in a district court of the United States sitting as a prize court; (2) to submit the case to the Court of Claims; (3) to proceed to determine the question arising and award the bounty. 205.
2. The Court of Claims has authority to hear and determine such questions of bounty, either as a claim founded upon a law of Congress or as one which may be transmitted to it by the head of a Department, under section 1063, Revised Statutes, and the act of March 3, 1887. *Ib.*
3. A claim for profits and expense incurred in the construction of a pier in the Aqueduct Bridge, Georgetown, D. C., under a contract annulled for lack of diligence in prosecuting the work, involves disputed facts, and possibly controverted questions of law, and is properly referable to the Court of Claims under the first clause of section 1063, Revised Statutes. 424.
4. A claim being one which might have been originally commenced in the Court of Claims by voluntary action of the claimant is not covered by the proviso to section 1063, Revised Statutes. *Ib.*

COURT OF CLAIMS—Continued.

5. Certain claims which accrued against the Hawaiian Government prior to annexation may be submitted to the Court of Claims for determination. 583.

CRIMES AND OFFENSES.

1. Congress can not delegate its legislative power so as to authorize an administrative officer, by the adoption of regulations, to create an offense and prescribe its punishment. 266.
2. The violation of the provisions of a statute that subject a person to a penalty, whether a forfeiture or otherwise, must be something more than an accidental or unwitting violation. 390.

CUBA.

1. In the distribution of supplies to the destitute inhabitants of Cuba the commanding officers may use either the officers of the Army or such other volunteer agencies as may be available for the purpose. 190.
2. The field of their operations is not necessarily restricted to the territory over which they exercise actual control. *Ib.*
3. The emergency fund of \$3,000,000 provided by the act of January 5, 1899, is intended to cover emergencies arising in the military administration of Cuba and other territory that has come into the possession of the United States through the operations of war. 301.
4. For the purpose of disbanding the insurgent forces in Cuba, the President is authorized to pay some or all of the soldiers of such forces either out of the revenues of the island or out of the emergency fund provided by the act of January 5, 1899. *Ib.*
5. The administration of the United States in Cuba being of a military nature and merely temporary, no action should be taken to bind the island or any of its municipalities to large expenditures in the way of public works, except upon grounds of immediate necessity. 310.
6. The obligations of the United States with reference to Cuba are merely those which arise from the fact that it is a temporary military occupant. 384.
7. The United States Government is not the successor of the Government of Spain in Cuba, but merely an intervening power arranging the succession, and as such it can not be held to have assumed the obligations arising from or growing out of concessions granted or contracts entered into by the Spanish Government in Cuba previous to its surrender of sovereignty therein. *Ib.*
8. Owing to the temporary nature of the occupation of the island of Cuba by the United States, it is inexpedient to grant permission to the Commercial Cable Company to land a cable upon the soil of Cuba. 408.
9. So far as the landing of a cable in the island of Cuba is concerned, the subject is under the control of the War Department, by

CUBA—Continued.

reason of the fact that its occupation is that of a military nature.
Ib.

10. The grounding of a cable upon the island of Cuba to connect it with a foreign country can not be done and maintained in opposition to the law of the Government which exercises sovereign power in the island. 514.
11. The authorities of the United States have full power, in their discretion, to prevent by all necessary means the grounding of a cable intended to connect the island of Cuba with the United States or any other country, or to prevent or disrupt any cable which may be laid in disregard to its instructions and against its will. *Ib.*
12. A concession in due form to construct certain tramways in the city of Havana was granted to one De la Torre in 1892. Subsequently the same concession was advertised at public auction and sold to De la Torre, the rival company failing to bid. *Held*, The owners of the De la Torre concession have a prima facie right to proceed at their own risk under the permission of the municipal authorities. 520.
13. The military order of December 24, 1898, forbidding the making of any grant or concession in the future, was not intended to apply to those previously made in due form. *Ib.*
14. The military authorities have power to direct the municipal authorities to suspend public works and improvements for proper public reasons, even where such suspension interferes with rights that have previously vested. *Ib.*
15. Any rights of Dady & Co. for the construction of certain works in Havana, if vested, are preserved by the treaty of Paris. 526.
16. In the exercise by the United States of the powers of municipal government it may change or modify the form or constituents of the municipal establishment, and in this exercise of sovereignty may provide the methods, terms, and conditions under which internal improvements may be carried on, or forbid them to be carried on, although inchoate or even completed contracts therefor have previously been entered into. *Ib.*
17. Any inchoate rights or grants made by a municipal body in Cuba under Spanish sovereignty, which for their completion require the assent or approval of the Crown or its officers, in the absence of such assent or approval made prior to the treaty of cession, are ineffective and incomplete. *Ib.*
18. Under Spanish laws lands under tide water to high-water mark in the ports and harbors in the Spanish West Indies belonged to the Crown, and as such, by treaty of cession, have become a part of the public domain of the United States. 544.
19. Since the exchange of ratifications of the peace treaty with Spain the occupation of Cuba by the United States has been occupation of a foreign country in time of peace, and is not made a

CUBA—Continued.

temporary war occupation or otherwise affected, internationally speaking, by the circumstances that the Army has been used as the agency. 654.

20. In ascertaining the obligation of the United States with regard to any debts that the government of Cuba may inherit from the former (Spanish) government of Cuba there should be taken into consideration the fact that Cuba is being occupied with the sole object of its pacification preparatory to turning over the control to the people of Cuba. *Ib.*

See COPYRIGHTS.

CUSTOM-HOUSE.

See SABINE PASS.

CUSTOMS LAWS AND REGULATIONS.

DUTIES—

1. The discretion committed to the Secretary of War with reference to the admission of certain materials free of duty by paragraph 4 of the act of June 6, 1896, is sufficiently broad to embrace and assume such purchases abroad made by contractors as appear to him to be proper. 98.
2. The Secretary of the Treasury has the power to permit the transfer and delivery to the steamship *Kaiser Wilhelm II* of a piece of machinery known as a "screw boss," brought into the harbor of New York by a sister ship for the purpose of replacing a defective piece in the former, without exacting the payment of duty. 360.
3. Neither the argols of Tunisian or Algerian origin imported from Marseilles are entitled, as products of France, to the benefit of the reciprocal commercial arrangement negotiated between France and the United States under section 3 of the tariff law of 1897. 477.
4. The merchandise taken from the wrecked steamer *Paris*, both hull and cargo of which were abandoned to the underwriters, the cargo being lightered from the wreck to the nearest available vessel of the same line, thus completing the interrupted voyage, may be regarded as merchandise taken from a wreck and entitled to entry by appraisement. 542.
5. The provision of section 23 of the customs administrative act relieving the importer from the payment of duties on damaged goods by abandoning them to the United States refers to loss or damage arising from ordinary causes during the voyage, and not to the extreme case of a wreck and loss or damage thereby. *Ib.*
6. Merchandise from Porto Rico is required to pay the same duties that would be charged upon merchandise imported from a foreign country, and the President has no authority to alter or modify the laws under which such duties are required to be paid. 560.

CUSTOMS LAWS AND REGULATIONS—Continued.

DUTIES—Continued.

7. In territory held by conquest, the military authorities in possession, in the absence of legislation by Congress, may make such rules or regulations and impose such duties upon merchandise imported into the conquered territory as they may deem wise and prudent. *Ib.*

DRAWBACK—

8. The drawback under section 25 of the act of October 1, 1890, is measured by the duties paid on the imported materials used in the manufacture of the exported articles and not by the imported materials found in such articles. 111.
9. The proviso of this section requires only that the imported materials "shall so appear in the completed articles that the quantity or measure thereof may be ascertained." *Ib.*
10. Ascertainment of quantity and measure is an act of the mind, and the required appearance is therefore not a visual, but a mental presentation. *Ib.*
11. Satisfactory proof having been presented to the customs officers that a certain amount of imported lead had been used in the manufacture of pig lead, an inspection or analysis of the pig lead must show that the imported lead, after allowing for waste, is present in the pig lead to be exported on which drawback is claimed. *Ib.*
12. It being satisfactorily shown that the imported materials so appear in the exported product that the quantity or measure thereof may be ascertained, a drawback is allowable. *Ib.*
13. A drawback may be allowed of the duties paid on imported lead, refined, in a bonded warehouse, subsequently withdrawn therefrom on payment of duties for domestic consumption, upon the exportation of articles manufactured wholly from such lead under the provision of the act of July 24, 1897. 119.
14. Section 29 of this act, providing that the refined lead set aside each day be treated thereafter as imported metal, conclusively distinguishes the product of the foreign from that of the domestic ore, and identifies the metal set aside as imported lead. *Ib.*
15. In case the refined metal set aside as the product of imported lead ore is not reexported within six months from the date of the receipt of the ore the regular duties must be paid on the imported ore. 285.
16. It being possible to ascertain the quantity or measure of sugar used in canning fruit for export, the drawback on such sugar under section 30 of the act of July 24, 1897, should be restored. 127.

WAREHOUSES—

17. A drawback may be allowed of the duties paid on imported lead, refined, in a bonded warehouse, subsequently withdrawn there-

CUSTOMS LAWS AND REGULATIONS—Continued.

WAREHOUSES—Continued.

from on payment of duties for domestic consumption, upon the exportation of articles manufactured wholly from such lead. 119.

18. Where a warehouse company refuses the delivery of goods for exportation, because of the nonproduction of a warehouse receipt, notwithstanding the permit from the collector, the Secretary of the Treasury is under no obligations and can not properly grant authority to compel the delivery of the goods. 152.
19. While the Government, under regulations, nominally delivers the merchandise for exportation, it does not relinquish possession of, but is interested in retaining it. *Ib.*
20. A warehouse is a private institution in charge of a public officer, and the Secretary of the Treasury may establish rules and regulations not inconsistent with law for the due execution of the laws relating thereto and to secure a just accountability under the same. *Ib.*
21. A warehouseman is interested in the joint custody with the Government by reason of his risks, his storage, and his contractual relations. *Ib.*
22. The private rights of the warehouseman and those having relations with him as such are in no wise affected by this joint custody, providing the rights of the Government in and about the collection of its customs are not interfered with. *Ib.*
23. Goods in a bonded warehouse may belong to one who is not the consignee and may be transferred by warehouse receipt or otherwise. *Ib.*
24. A warehouse is a place for storing goods, not for selling them at retail. 279.
25. A warehouse receipt is nothing more nor less than the written statement of the warehouseman that certain goods, merchandise, or property are deposited in his warehouse and held on storage for some particular person or persons. 283.

MISCELLANEOUS—

26. The Treasury Department has no authority to insist that declarations upon goods obtained by purchase under section 3 of the act of June 10, 1890, shall contain the further clause declaring that the prices in the invoice represent the actual foreign-market value on the day of shipment, etc. 405.
27. The Secretary of the Treasury can not, by his regulation, alter or amend a revenue law so as to insert into the body of the statute a limitation which Congress did not think it necessary to prescribe. *Ib.*
28. An importer refusing to answer a proper question respecting imported merchandise has not complied with the requirements

CUSTOMS LAWS AND REGULATIONS—Continued.

MISCELLANEOUS—Continued.

- of the law, and is not entitled to a reappraisalment, but the original appraisalment becomes final and conclusive. 456.
29. The Board of General Appraisers were warranted in refusing to hear and pass upon a question whether an importer was justified in refusing to answer interrogatories under sections 16 and 17 of the act of June 10, 1890, submitted to them in reappraisalment proceedings under section 13. *Ib.*
30. The collector is the authority to determine whether an interrogatory is proper, and the refusal to answer is justified. *Ib.*
31. The action of the collector in denying a reappraisalment because the importer refused to answer proper interrogatories propounded to him may be reviewed, first by the Board of General Appraisers and next by the circuit court. *Ib.*
32. Certain merchandise was seized and libeled. The United States attorney recommends the acceptance of an offer of claimants to compromise, finding no fraud or irregularity on their part. *Held*, Not to be a proper case for compromise. 491.
33. Under the primary broad and general control of the Attorney-General of suits in which the United States is interested, he is authorized to make such disposition of pending litigation, including the class of cases embracing the one at issue, as seems to him meet and proper. *Ib.*
34. The admission of merchandise into the ports of the United States from conquered territory is governed solely by existing laws passed by Congress, and the President has no power to add to or detract from the force and effect of such laws. 560.

CUSTOMS SERVICE.

1. The per diem officers and employees of the customs service are upon the same footing with reference to leaves of absence as clerks in the Executive Departments at Washington. 78.
2. The subordinate officers and employees of the customs service, wherever employed, are entitled to the privileges of the statute with reference to leaves of absence, whether they receive annual or per diem compensation. *Ib.*

DAMAGES.

1. The imprisonment of a citizen of the United States by an officer of a foreign Government without judicial process or allegation of a violation of law, but because of an alleged disrespect of such official's authority, is such an injury as to render such Government liable in damages. 32.
2. Loss of time, absence from business, personal humiliation, and bodily and mental suffering resulting from a wrongful arrest and imprisonment are, under the laws of civilized countries, grounds for compensatory damages, the amount being determined in cases of this character through negotiations. *Ib.*

DAMAGES—Continued.

3. Unless authorized by Congress the head of a Department has no power to adjust and pay claims for unliquidated damages, even when arising from the breach of a contract, except where such claims are for work and labor done or materials furnished under a contract silent as to the price and the amount thereof unliquidated. 437.
4. There is no objection to the submission to Congress of the claim of the British Cuba Submarine Telegraph Company for damages by our vessels occurring during the hostilities with Spain. 654.
5. There is no ground to support the claim for indemnity of the British Eastern Extension Australasia and China Telegraph Company for cutting the cable at Manila during the war with Spain. 315.

DEAF AND DUMB INSTITUTION.

See COLUMBIA INSTITUTION FOR THE DEAF AND DUMB.

DEALER.

1. The place of business of a retail dealer in any commodity can not properly be termed a warehouse. 279.
2. Retail liquor dealers are not required to pay the additional tax of \$1 imposed by the war-revenue law on fermented liquors purchased by them prior to June 14, 1898, and held in stock by them on that day. *Ib.*

DEFINITIONS.

See WORDS AND PHRASES.

DEPARTMENTAL CONSTRUCTION.

See STATUTORY CONSTRUCTION, 5, 6.

DEPARTMENT OF AGRICULTURE.

1. The term "Executive Departments" in the Federal statutes refers only to those Departments specified in section 158, Revised Statutes, to which has since been added the Department of Agriculture. 62.
2. The direct object of section 89 of the act of January 12, 1895, was to limit the number of pages of the bulletins of the Department of Agriculture to 100 and the maximum size of the pages to octavo. 265.

DEPARTMENT OF STATE.

See CLAIMS, 4.

DESTITUTE.

See CUBA, 1, 2.

DISBURSING OFFICERS.

1. Checks or drafts issued by the disbursing officers of the United States upon Government funds on deposit, in payment of its obligations or dues, are exempt from a stamp tax. 134.

DISBURSING OFFICERS—Continued.

2. The five years' limitation within which suits may be brought upon the official bonds of disbursing officers begins to run from the time the accounting officers of the Treasury make the statement of the account showing an indebtedness to the United States. 611.
3. Checks of disbursing officers drawn upon the public Treasury or an assistant treasurer of the United States may be properly indorsed and transferred by either the payee, indorsee, or by an agent of either acting as such under a power of attorney from such payee or indorsee. 637.

DISTILLERY.

See INDIAN TERRITORY, 2.

DISTRICT OF COLUMBIA.

1. The approval of the Secretary of War is required for projections beyond the building line in that part of the city of Washington formerly known as Georgetown. 9.
2. Congress, having power to prevent all projections beyond the building line in any part of the city of Washington, as now established, may permit projections upon such conditions as it may see fit to impose. *Ib.*
3. The officers and employees of the District of Columbia are not officers and employees of the General Government of the United States, but of the municipal corporation known as the District of Columbia. 59.
4. Such officers and employees are as distinct from the civil service of the United States as would be the officers of any city government in one of the States of the Union from the civil service of the State itself. *Ib.*
5. The acceptance by the commanding general of the National Guard of the District of Columbia of a commission as colonel in the Volunteer Army, for service in the war with Spain, did not operate as a vacation of the District command. 237.
6. Such commanding officer is authorized, under the act of May 11, 1898, to nominate candidates for appointment as officers in the naval battalion. *Ib.*
7. The granting of a revocable license to the Washington and Glen Echo Railway to lay a single track on the Aqueduct Reservation near Cabin John Bridge does not conflict with the acts authorizing the construction of the Washington and Great Falls Railway Company and providing that there shall be but one railway parallel to and near the Conduit road. 240.
8. The license granting the right to construct the road should contain such restrictions or regulations as may be necessary to fix its location and protect Government property. *Ib.*

DRAFTS.

See DISBURSING OFFICERS, 1.

DRAWBACKS.

See CUSTOMS LAWS AND REGULATIONS, 8-16.

DUE PROCESS OF LAW.

Trial by a court not legally constituted is not a trial which can be said to be "due process of law." 137.

EMERGENCY FUND.

See CUBA, 3, 4.

ENDORSEMENT.

See ENDORSEMENT.

EXAMINATION.

See CUSTOMS LAWS AND REGULATIONS, 25-28.

EXECUTIVE DEPARTMENTS.

1. The Civil Service Commission is not attached in any wise to any of the Executive Departments, nor is it subject in any wise to the control of any of the heads of such Departments. 62.
2. No board, commission, bureau, or office which is not expressly or by implication under the control of one of the Executive Departments can be considered as belonging properly to one of them. *Ib.*
3. Section 7 of the act of March 15, 1898, requires seven hours of labor each day, and does not permit of the allowance of half an hour for luncheon within the seven hours. *Ib.*
4. The term "Executive Departments" in the Federal statutes refers only to those Departments specified in section 158, Revised Statutes, to which has since been added the Department of Agriculture. *Ib.*
5. A clerk or other employee of an Executive Department of the Government, whose duties are performed at a place other than the seat of government, is as much entitled to the benefits of the act of March 15, 1898, with reference to leaves of absence, as one whose duties are performed in the city of Washington. 78.
6. Many things may be done by the head of an Executive Department without the actual signature of the President, which, when done, are his acts; but in such case the documents should declare it to be the act of the President performed by the head of the Department as his representative. 82.

See LEAVES OF ABSENCE.

FEES.

Section 1703, Revised Statutes, allows consular agents all the fees collected, unless there is an order to the contrary limiting the compensation to a part only of the fees received, in which event the residue is added to the income of the principal consular officer. 163.

FERMENTED LIQUORS.

See INTOXICATING LIQUORS.

FISHERIES.

The regulation of fisheries in navigable waters within the territorial limits of the several States, in the absence of Federal treaty, is a subject of State rather than of Federal jurisdiction. 214.

See SEAL FISHERIES.

FOREST RESERVATIONS.

1. Congress has the right to place the control of the occupancy and use of forest reservations in the hands of the Secretary of the Interior for their preservation. 266.
2. A criminal prosecution will lie to punish a person who grazes sheep in a forest reservation in violation of the regulations promulgated by the Secretary of the Interior pursuant to law. *Ib.*
3. The right of forest supervisors and rangers to arrest persons violating the laws or the rules and regulations for the protection of forest reservations being doubtful, it is suggested that relief be had through Congressional action. 512.

FORFEITURES.

1. Regulations for the forfeiture or destruction of imported prohibited articles may be so framed as to provide due process of law. 29.
2. The Secretary of the Treasury and the Postmaster-General, in making and enforcing rules and regulations with reference to the importation of music and music books in violation of copyright laws, may provide for their summary destruction without notice. 70.
3. When property is of trifling value, and its destruction is necessary to effect the object of a valid law, it is within the power of the legislature to order its summary destruction without obtaining a forfeiture by judicial proceedings. *Ib.*
4. The violation of the provisions of a statute that subject a person to a penalty, whether a forfeiture or otherwise, must be something more than an accidental or unwitting violation. 390.
5. The United States attorney recommends the acceptance of an offer of compromise under section 3469, Revised Statutes, in the case of certain merchandise duly seized and libeled, finding no fraud or irregularity. *Held*, Not to be a proper case for compromise. 491.
6. The Attorney-General may make such disposition of pending litigation, including the class of cases embracing the one at issue, as seems to him proper. *Ib.*
7. After a forfeiture has been adjudged or decreed it can not be remitted. *Ib.*

FORT SILL MILITARY RESERVATION.

1. Such portion of the Fort Sill Military Reservation can be set apart as may be required for the erection of the necessary buildings

FORT SILL MILITARY RESERVATION—Continued.

- to be used as a mission and school for the Apache prisoners of war. 303.
2. The Secretary of War may make such rules and regulations as shall be deemed suitable and necessary to control the methods and operations of the persons engaged in this work. *Ib.*

FRANCE.

Neither the argols of Tunisian or Algerian origin imported from Marseilles are entitled, as products of France, to the benefit of the reciprocal commercial arrangement negotiated between France and the United States under section 3 of the tariff law of 1897. 477.

FRAUD.

1. Where a judgment recovered against the United States in the Court of Claims has been paid and is subsequently set aside on the ground of fraud, the money can be recovered, if at all, because of the fraud, and not because it is property or proceeds thereof belonging to the United States and now withheld. 411.
2. The Secretary of the Treasury has no authority under section 3755, Revised Statutes, to enter into a contract with a private individual for the collection of such money. *Ib.*

FREE DELIVERY.

See POSTAL SERVICE.

GAMBLING.

An advertising circular, containing a picture and description of a slot machine designed for the purpose of gambling or the distribution of prizes dependent upon lot or chance, can not be excluded from the mails of the United States. 198.

GENERAL APPRAISERS.

See BOARD OF GENERAL APPRAISERS.

GREAT BRITAIN.

See SEAL FISHERIES.

HARBOR LINES.

1. Congress has the power to establish harbor lines or modify existing ones in navigable waters within the limits of a State, although such State has already established such harbor lines. 501.
2. The fact that harbor lines have once been established is no bar to the exercise of the same power as often as the needs of commerce require. *Ib.*
3. The Secretary of War has the power to establish a harbor line for Tacoma Harbor or modify the existing one in the harbor at Seattle, as he shall determine, if in his opinion the interests of commerce and navigation so require. *Ib.*

HARBORS.

See RIVERS AND HARBORS.

HAVANA.

The question whether the claims of a certain company relating to the performance of a contract entered into with the city of Havana are sufficiently complete to constitute a contractual relation, and whether they ought to be ultimately recognized and confirmed, is such as should be left to the decision of the authorities of Havana. 310.

HAWAII.

1. In the resolution annexing the Hawaiian Islands Congress affirmatively indicated its intent that such laws as our tonnage-tax laws are to remain undisturbed until it shall provide a form of government for such islands, or until the commission shall advise and Congress shall enact legislation therefor. 150.
2. The fact that the Hawaiian Islands have been annexed to the United States does not relieve vessels from such ports from being considered as from foreign ports and as coming under the laws governing tonnage tax. *Ib.*
3. When territory is acquired by treaty, conquest, or otherwise, its relation to the nation acquiring it depends upon the laws of that nation, unless controlled by the instrument of cession. *Ib.*
4. The restrictions placed upon the admission to the United States of Chinese persons of the exempt class, and the regulations affecting the departure and return to this country of registered Chinese laborers, are to be held applicable to Chinese persons applying for admission to the Hawaiian Islands or to such persons residing there who may wish to depart with the intention of returning. 249.
5. The laws of the United States affecting the Hawaiian Islands, as well as the laws of such islands, are to remain generally undisturbed by reason of the resolution of annexation until Congress provides a government therefor. *Ib.*
6. Any law of the Hawaiian Islands inconsistent with the terms of the resolution of annexation is invalid and inapplicable. *Ib.*
7. The inhabitants of Hawaii, in the absence of affirmative legislation by Congress to that effect, are not entitled to the benefit of the United States copyright laws. 268.
8. The Secretary of the Treasury has authority to admit to the Hawaiian Islands such Chinese persons as departed therefrom under regulations of the existing government allowing them to return, as they are not excluded by the extension to the islands of the law and regulations now operative within the United States. 353.
9. By the resolution of annexation the local government of Hawaii was deprived of all authority to dispose of public lands in any

HAWAII—Continued.

- manner whatsoever, except by virtue of special laws enacted by Congress. 574, 627.
10. The Hawaiian authorities can not in anywise certify to the national character of a vessel, as such Hawaiian national character can no longer be attributed to vessels owned by the inhabitants of the islands. 578.
 11. The registration laws of Hawaii have been abrogated as a necessary consequence of its annexation to the United States. *Ib.*
 12. An order of the Executive suspending the issuance of Hawaiian registers would be a legal exercise of power under the resolution of Congress annexing Hawaii. *Ib.*
 13. Certain claims against Hawaii which accrued prior to the annexation should properly be presented to, considered, and paid by the Hawaiian government, but all such claims should first be received by the Department of State, through diplomatic channels, and then transmitted to the government of Hawaii for adjustment. 583.
 14. Citizens of the United States may present their claims against the Hawaiian government, or take such other proceedings in court as the municipal laws of Hawaii will allow. *Ib.*
 15. Questions such as are involved in these claims may be submitted to the Court of Claims for determination. *Ib.*
 16. All interest of the Republic of Hawaii in public lands at the time the resolution of annexation took effect was transferred to the United States, and thenceforth the officials of Hawaii were without power to convey by grant or cession the legal or equitable title of the United States. 627.
 17. The Hawaiian government has no power to convey or confirm title to public lands where conditional sales or entries were made prior to the resolution of annexation and the conditions entitling such persons or entrymen to a grant have been subsequently performed. *Ib.*
 18. The Hawaiian Republic, as a separate sovereign power, ceased to exist when the resolution of annexation took effect, and it exists as an organized government only for the purpose of municipal legislation and for such special purposes as were expressed in the resolution. *Ib.*
 19. The term "municipal legislation" is limited to that class of laws that relate solely to the internal affairs of the country and the relation of the people to each other. *Ib.*
 20. Congress having failed to legislate on the subject of public lands for the Hawaiian Islands, the government of Hawaii is not reinvested with its former power of their disposition. *Ib.*

HEMP.

See PHILIPPINE ISLANDS, 5.

HOLIDAYS.

On April 6, 1899, the Washington Navy-Yard being closed at noon, pursuant to an Executive order, in connection with the ceremonies attending the interment of the bodies of certain soldiers and sailors, the per diem employees of the yard should receive compensation for the entire day. 472.

HOSTILITIES.

See WAR.

IMMIGRANTS.

1. Alien immigrants pronounced by competent authority to be suffering from a loathsome or dangerous contagious disease are not entitled to enter the United States. 122.
2. Entrance by land, as well as landing from a vessel, is forbidden by the law. *Ib.*
3. An alien who has resided in this country without becoming naturalized, and who departs with the intention of returning, is not to be deemed an immigrant upon his return, although he was an alien immigrant when he first entered the country. 353.
4. Congress has power to exclude aliens altogether from the United States, or to prescribe the terms and conditions on which they may come into this country. *Ib.*
5. The list of immigrants required by section 1 of the act of March 3, 1893, should be made before departure from a foreign country. 460.
6. Under this act the immigrants can not be divided according to the parts of the vessel they occupy, as the word "immigrant" undoubtedly embraces persons who may be, and sometimes are, in the cabins. *Ib.*
7. The separation of those who should and who should not be subjected to the examination and listing is a matter of practical administration intended to be regulated by the Secretary of the Treasury. *Ib.*
8. The Secretary of the Treasury is vested with power to make and apply such rules relative to the question of immigration as may be shown from time to time to be necessary and convenient. *Ib.*
9. Certain natives of the Philippine Islands, not being professional actors, artists, or singers within section 5 of the contract-labor law, are properly excluded, unless on other grounds they may be regarded as not within the prohibition of the law. 495.

See CHINESE; IMMIGRATION.

IMMIGRATION.

1. The officers or servants of a corporation responsible for or actually engaged in breach of the immigration laws under the act of 1891 are liable to the penalty imposed by section 6, in addition to which the corporation itself is liable for such violations. 122.

IMMIGRATION—Continued.

2. Transportation companies conducting the business of transportation, either by land or water, are included within the term "person" as used in section 6 of this act, and are accordingly liable to the penalties prescribed therein. *Ib.*
3. To immigrate is to come into a country of which one is not a native, and in which one has not acquired a residence or domicile. 353.

See IMMIGRANTS.

IMPORTATIONS.

Regulations for the forfeiture or destruction of imported prohibited articles may be so framed as to provide due process of law. 29.

See COPYRIGHTS, 1, 3-5; CUSTOMS LAWS AND REGULATIONS.

IMPRISONMENT.

See INTERNATIONAL LAW, 1, 2.

INCOMPATIBILITY.

Incompatibility in law exists where the nature and duty of two offices are such as to render it improper, from considerations of public policy, for one incumbent to hold both, and does not necessarily arise when the incumbent places himself for the time being in a position where it may be impossible for him to discharge the duties of both offices. 237.

INDEMNITY.

See CABLES.

INDIAN COUNTRY.

See INDIAN TERRITORY.

INDIAN TERRITORY.

1. While the general Indian country ceases to be such upon the extinction of the Indian title, the territory as organized and defined by metes and bounds and named Indian Territory does not at all cease to be such upon any such contingency. 232.
2. The establishment of a distillery on lands in the Indian Territory, although the Indian title thereto has become extinct, is in contravention of law. *Ib.*

INDORSEMENT.

1. Negotiable paper may be transferred so as to pass the title and ownership, by the indorsement of the payee or indorsee thereon, which may be made as well by the agent of such payee or indorsee as by such principal. 637.
2. Checks of disbursing officers drawn upon the public Treasury or an assistant treasurer of the United States may be properly indorsed and transferred by either the payee, indorsee, or by an agent of either, acting as such under a power of attorney from such payee or indorsee. *Ib.*

INDUSTRIAL PROPERTY.

The laws of Spain concerning industrial property discussed. 617.

INFECTIOUS DISEASES.

See CONTAGIOUS DISEASES.

INTEREST.

1. Where money is due and payable on a contract at a specific time and is withheld, the creditor is entitled to demand and receive interest at the rate prevailing in the forum where suit is brought, except as against the Government of the United States and sovereign States. 172.
2. The North American Commercial Company is liable to the United States for interest upon the sums overdue on account of taxes, rental, and bonus under its lease with the United States. *Ib.*
3. In an action for use and occupation or for mesne profits, where the recovery is of a sum in the nature of rent, interest is allowed on each annual sum from the end of the year. *Ib.*

INTERIOR DEPARTMENT.

1. The Columbia Institution for the Deaf and Dumb is in the Department of the Interior. 1.
2. By the act of March 3, 1899, the Census Bureau is made a part of the Interior Department, and as such its accounts are subject to such rules and regulations as the Secretary may prescribe. 413.

INTERNAL-REVENUE LAWS AND REGULATIONS.

BANKS—

1. The capital of a bank and other funds belonging to it which, by law or the action of the bank authorities, assume the character of capital, and which the bank uses in carrying on its business, is what the law has in view as the subject of taxation. 320.
2. The tax referred to in paragraph 1 of the act should be computed on the basis of the capital and surplus for the fiscal year preceding the time at which the assessment is made. *Ib.*
3. The undivided profits of a bank are not surplus, and can not be estimated under the war-revenue act as a part of the bank surplus. *Ib.*
4. State banks are taxable upon the amount of their capital, together with such additional surplus or funds belonging to them as may be set apart either by law or by the action of the bank authorities and used in carrying on the general business of the bank. *Ib.*

BILL OF LADING—

5. The bill of lading, manifest, or receipt, issued to the consignor by the United States Express Company when receiving money and securities for transportation under its contract with the Government, must have attached a revenue stamp duly canceled. 192.
6. Money and merchandise carried by the Adams Express Company for the Pennsylvania Railroad Company over the lines of the

INTERNAL-REVENUE LAWS AND REGULATIONS—Continued.

BILL OF LADING—Continued.

latter, free of charge, under a contract between the two companies, do not require a bill of lading, or manifest, under the provisions of the war-revenue law, and, if given, it is not liable to a stamp tax. 252.

BOND—

7. A bond, though prepared and signed, still in the possession of the obligor unissued, and which may never be, is not a debt or obligation which is liable to taxation. 531.
8. Bonds provided for in a mortgage, to be issued or not as the future action of the mortgagor may determine, are not, until issued, the subject of taxation or an element in estimating the amount of stamps required for the mortgage. *Ib.*

BOND OR NOTE—

9. As under the resolution of February 28, 1899, only one stamp is required upon two separate papers which constitute one transaction, as where a bond or note is given to evidence a debt and the mortgage executed to secure the same, the purposes of the law are fulfilled when the stamp in proper amount is affixed to either and canceled, such stamp being the highest rate required by said papers or either of them. 531.

"CALL"—

10. A writing termed a "call," in which the signer agrees to sell the stock described in the paper at the price named, provided that holder of the paper calls upon him within the time specified, is taxable under the first paragraph of Schedule A of the war-revenue law. 447.

CERTIFICATES—

11. Stamps should be affixed to certificates or other instruments issued for private use, prior to their delivery, to be furnished by the party applying therefor. 134.

CHARTER PARTIES—

12. The paragraph of the war-revenue act of June 13, 1898, relating to charter parties, does not apply to vessels engaged in domestic commerce, as the law does not require that their tonnage should be registered. 168.
13. The charter parties of registered vessels sailing between the Atlantic and Pacific coasts of the United States in the coasting trade are to be stamped. 270.
14. The paragraph of Schedule A under the head of "Charter party" in the war-revenue law, applies to all vessels registered under the provisions of Title XLVIII, Revised Statutes, and does not apply to vessels enrolled or licensed under Title L. *Ib.*

CHECKS—

15. Checks or drafts issued by the disbursing officers of the United States upon Government funds on deposit, in payment of its obligations or dues, are exempt from this tax. 134.

INTERNAL REVENUE LAWS AND REGULATIONS—Continued.

EXCESS BAGGAGE RECEIPT—

16. An excess baggage receipt issued by a railroad company to a passenger for excess weight of baggage does not require a stamp under the war-revenue law. 246.

FERMENTED LIQUORS—

17. Section 3339, Revised Statutes, as amended by the war-revenue law, still contains the express provision that the tax on fermented liquors must be paid by the brewer. 279.

INSTRUMENT—

18. A paper or instrument stipulating that certain securities or other property shall be held as indemnity or as a basis of credit, or a guaranty generally, without specifying particular property as security for the payment of a definite and certain sum, is not liable to tax under the provisions of the war-revenue act. 218.
19. The liability of an instrument to a stamp tax, as well as the amount of such tax, is determined by the form and face of the instrument, and can not be affected by proof of facts outside of the instrument itself. 368.

INSURANCE POLICY—

20. The purpose of Schedule A of the war-revenue law is to tax the policy by which an insurance is made, either life, fire, or marine, and not the reinsurance of such policy. 318, 376.

LEGACIES—

21. The tax provided for in section 29 of the war-revenue law is upon such legacies and distributive shares arising from personal property as exceed \$10,000 in actual value, and not upon the gross amount of the estate in the hands of the executor or administrator. 298.

LIQUOR DEALERS—

22. Retail liquor dealers are not required to pay the additional tax of \$1 imposed by the war-revenue law on fermented liquors purchased by them prior to June 14, 1898, and held in stock by them on that day. 279.

MEDICINAL DRUGS—

23. Uncompounded medicinal drugs or chemicals, no matter how put up or what is claimed for them, are exempt from tax by section 20 of the act of June 13, 1898. 272.
24. The act does not apply to such medicinal articles or preparations as are put up under pharmaceutical or classifying names for use of physicians in their practice, or pharmacists or druggists in their trade. *Ib.*
25. The class of medicines taxable under the provisions of the law are such as go to the consumer in the unbroken packages in which they are put up by the proprietor, manufacturer, or compounder, with name and disease and the directions for use without the intervention of a prescription of a physician or pharmacist. *Ib.*

INTERNAL-REVENUE LAWS AND REGULATIONS—Continued.

MEDICINAL DRUGS—Continued.

26. By the last clause of section 20 of the act of June 13, 1898, Congress intended to levy tax upon proprietary medicinal articles, or such as assume the character before the public of proprietary, patent, or trade-mark articles, and such medicinal articles as go from the hands of the proprietor, compounder, or manufacturer so put up in packages as to comport with the manner and style of patent, trade-mark, or proprietary medicines in general. *Ib.*

MORTGAGE—

27. In fixing the amount of tax required upon a mortgage or pledge of stock or property given to secure the payment of a promissory note for a definite and certain sum, the actual value of the stock or property is immaterial. 218.
28. Such a paper, being a pledge of property for the payment of a debt, is not to be construed as a power of attorney and stamped as such, as it only authorizes the holder, in case of default, to make the securities available for the purposes for which they were deposited. *Ib.*

See *ante*, § 8.

PROMISSORY NOTE—

29. Upon promissory notes a stamp is required of the value of 2 cents for a sum not exceeding \$100, and for each \$100 or fractional part thereof in excess of \$100, 2 cents additional. *Ib.*

"PUT"—

30. The written evidence of a transaction called in brokers' parlance a "put," being an agreement on the part of the signer to buy stock, the opportunity to purchase being entirely dependent upon the disposition of the bearer or the party to whom the paper is given, is not taxable under the war-revenue law. 447.

REBATE CHECKS—

31. Rebate checks which are given by a railroad company to passengers who purchase their tickets from the conductor aboard the train do not require a stamp under the provisions of the war-revenue law. 248.

RECEIPTS—

32. All receipts given for goods, merchandise, or property held on storage in a warehouse must be stamped. 283.

See *ante*, §§ 5, 16.

REINSURANCE POLICIES—

33. Reinsurance policies need not be stamped under the war-revenue law of June 13, 1898. 318, 376.

STAMPS—

34. The Commissioner of Internal Revenue has authority, with the approval of the Secretary of the Treasury, to make regulations looking to the redemption of unused documentary stamps issued under the act of June 13, 1898. 568.

INTERNAL-REVENUE LAWS AND REGULATIONS—Continued.

STAMPS—Continued.

35. In the absence of such rules, the Commissioner of Internal Revenue may cause such unused stamps to be redeemed. *Ib.*

MISCELLANEOUS—

36. The term "goods," as used in the war-revenue act of June 13, 1898, includes money. 178.
37. A doubt existing as to the right of the Government to exclude from packages of manufactured tobacco, cigars, cigarettes, etc., everything except the wrapper, label, and stamps under the act of June 24, 1897, a case should be presented to the courts to test the question. 181.
38. So long as a contractor is taxed uniformly with all others in the same line of business, upon the same transactions, and the tax is levied for proper objects of taxation, he can not complain merely because his compensation or profits under his contract with the Government are thereby indirectly reduced. 192.
39. The term "accepted for transportation," as used in the war-revenue law, means goods received from a shipper or consignee other than the carrier itself, and is intended to apply to goods received for transportation in the usual manner by common carriers. 252.
40. Papers and instruments executed, made, or issued, and certificates given by officers of the United States in the discharge of their official functions and for the use and benefit of the Government, are exempt from tax. 134.

INTERNATIONAL LAW.

1. The imprisonment of a citizen of the United States by an officer of a foreign Government without judicial process, or allegation of a violation of law, but because of an alleged disrespect of such official's authority, is such an injury as will render such Government liable in damages. 32.
2. Loss of time, absence from business, personal humiliation, and bodily and mental suffering resulting from a wrongful arrest and imprisonment are, under the laws of civilized countries, grounds for compensatory damages, the amount being determined in cases of this character through negotiations. *Ib.*
3. The terms upon which the representation of the interests of the United States at Havana was intrusted to the British consul during the war with Spain were informal, and did not specifically include the service of visé certificates to be issued to Chinese persons. 72.
4. When territory is acquired by treaty or conquest, or otherwise, its relation to the nation acquiring it depends upon the laws of that nation, unless controlled by the instrument of cession. 150.
5. Hostilities between nations suspend intercourse and deprive citizens of the hostile nations of rights of an international character previously enjoyed. 268.

INTERNATIONAL LAW—Continued.

6. Property of a neutral, permanently situated within the territory of an enemy, is, from its situation, liable to damage from the lawful operations of war, and no compensation is due for such damage. 315.
7. On the cession of territory by one nation to another the internal laws and regulations of the former designated as municipal continue in force and operation until the new sovereign imposes different laws and regulations. 526.
8. The laws which are political in their nature and pertain to the prerogatives of the former Government immediately cease upon the transfer of sovereignty. *Ib.*
9. When public property is ceded by one nation to another its disposition and control are thereafter regulated and governed by the laws of the new owner. 546.
10. If in the grant of a right or privilege the sovereign has retained any authority which may affect its untrammelled exercise and enjoyment, such right is inchoate, and can be exercised only by the grace of the succeeding sovereign. *Ib.*
11. In territory held by conquest, the military authorities in possession, in the absence of legislation by Congress, may make such rules or regulations and impose such duties upon merchandise imported into the conquered territory as they may deem wise and prudent. 560.
12. The laws of a Government which have for their object a certain governmental policy, such as those for the disposition of public domain and the granting of quasi-public franchises, rights, and privileges to private individuals or corporations, ceases to have any force or effect after the sovereignty of such Government ceases. 574.
13. The issuance of registry to a vessel, entitling it to carry national colors, is an act of sovereignty, although the register itself is not the only document recognized by the law of nations as indicative of the ship's national character. 578.
14. In case of the annexation of a State or cession of territory, the substituted sovereignty assumes the debts and obligations of the absorbed State or territory, taking the burdens with the benefits. 583.
15. The exception to this rule occurs where it is otherwise expressly provided by treaty stipulation, or the instrument of cession, when the absorbed territory becomes an integral part of the acquiring State, and is altogether merged in it, as in the case of the transfer of contiguous territory to a monarchy. *Ib.*
16. Where there is a distinct and independent civilized Government, potent and capable within its territorial limits, conducted by a separate executive, not acting as the mere representative by appointment of the distant central administration, such Government should respond, out of its separate assets, to any valid claims upon it, whether accruing in past, present, or future. *Ib.*

INTERNATIONAL LAW—Continued.

17. Since the exchange of ratifications of the peace treaty with Spain the occupation of Cuba by the United States has been occupation of a foreign country in time of peace, and is not made a temporary war occupation or otherwise affected, internationally speaking, by the circumstances that the Army has been used as the agency. 654.

See CABLES; HAWAII.

INTOXICATING LIQUORS.

1. The sale of liquors on board of American vessels in Alaskan waters is forbidden except upon permit obtained according to law from the customs officials. 118.
2. Such sales on British vessels may be prohibited under Treasury regulations. *Ib.*
3. The establishment of a distillery on lands in the Indian Territory, although the Indian title thereto has become extinct, is in contravention of law. 232.
4. Section 3339, Revised Statutes, as amended, requires the tax on fermented liquors to be paid by the brewer. 279.
5. The act of March 2, 1899, does not prohibit the sale of intoxicating drinks through the canteen section of the post exchange by parties other than officers and private soldiers. 426.
6. No officer or private soldier can be detailed in the canteen section to sell intoxicating drinks, either directly or indirectly. *Ib.*

INSTRUMENT.

1. A paper or instrument stipulating that certain securities or other property shall be held as indemnity or as a basis of credit, or a guaranty generally, without specifying particular property as security for the payment of a definite and certain sum, is not liable to tax under the provisions of the war-revenue act. 218.
2. Such a paper, being a pledge of property for the payment of a debt, is not to be construed as a power of attorney and stamped as such, as it only authorizes the holder, in case of default, to make the securities available for the purposes for which they were deposited. *Ib.*
3. The liability of an instrument to a stamp tax, as well as the amount of such tax, is determined by the form and face of the instrument, and can not be affected by proof of facts outside of the instrument itself. 368.

INSURANCE POLICY.

The purpose of Schedule A of the war-revenue law is to tax the policy by which an insurance is made, either life, fire, or marine, and not the reinsurance of such policy. 318, 376.

INSURGENTS.

See CUBA, 4.

JUDGMENT.

See FRAUD, 1.

KANSAS PACIFIC RAILWAY COMPANY.

See UNION PACIFIC RAILWAY, 1.

LABOR.

See CONTRACT LABOR; EXECUTIVE DEPARTMENTS, 3.

LEAD.

See CUSTOMS LAWS AND REGULATIONS, 8-14, 17.

LEAVES OF ABSENCE.

1. Sundays and days declared to be legal holidays by law or Executive order should be included in the annual leave to be granted under the terms of the act of March 15, 1898. 77.
2. The per diem officers and employees of the customs service are upon the same footing, with reference to leaves of absence, as clerks in the Executive Departments at Washington. *Ib.*
3. A clerk or other employee of an Executive Department of the Government whose duties are performed at a place other than the seat of Government is as much entitled to the benefits of the act of March 15, 1898, with reference to leaves of absence, as one whose duties are performed in the city of Washington. *Ib.*
4. The subordinate officers and employees of the customs service, wherever employed, are entitled to the privileges of the statute with reference to leaves of absence, whether they receive annual or per diem compensation. *Ib.*
5. Sixty days' leave of absence, with pay, may be granted employees in the Executive Departments, provided that as much as thirty days of it was made necessary by personal illness. 255.
6. The act of July 7, 1898, nullifies so much of the act of March 15, 1898, as provides that the thirty days' sick leave shall only be granted with pay in exceptionally meritorious cases, and reestablishes the law authorizing thirty days' annual leave with pay without any cause being given and thirty days' additional leave on account of sickness. *Ib.*

LEGACIES.

1. The tax provided for in the war-revenue law is upon such legacies and distributive shares arising from personal property as exceed \$10,000 in actual value, and not upon the gross amount of the estate in the hands of the executor or administrator. 298.
2. A legacy or distributive share, in contemplation of law, does not pass to an executor or administrator, but passes through them to such person as is entitled. *Ib.*

LEHIGH VALLEY RAILROAD COMPANY.

The act of August 17, 1894, does not, of its own force, prohibit the Lehigh Valley Railroad Company from exercising its privilege under the New Jersey statutes of closing its drawbridge over the Passaic River a reasonable time for repairs. 312.

LICENSE.

1. In the manufacture of a patented breech mechanism under a certain license the United States is confined to its own shops, and can not contract with others therefor. 10.
2. From the right to use a patent the right to make or have made may be implied; but this implication can only be made when the right to use is unrestricted. *Ib.*
3. The granting of a revocable license to the Washington and Glen Echo Railway to lay a single track on the Aqueduct Reservation near Cabin John Bridge does not conflict with the acts of July 29, 1892, and June 3, 1896, authorizing the construction of the Washington and Great Falls Railway Company and providing that there shall be but one railway parallel to and near the Conduit road. 240.
4. The license granting the right to construct the road should contain such restrictions or regulations as may be necessary to fix its location and protect Government property. *Ib.*
5. The granting of a revocable license subject to termination at any time at the will of the Government confers no contractual right upon the licensee. *Ib.*
6. The open and notorious use of Government reservations by licensees for other than governmental purposes, and the long-continued exercise of the power to grant such use by the Secretary of War without legislative objection, implies the tacit assent of Congress to this custom, but it can not be maintained upon any ground except that of benefit to the public interests. *Ib.*
7. Such portion of the Fort Sill Military Reservation can be set apart as may be required for the erection of the necessary buildings to be used as a mission and school for the Apache prisoners of war. 303.
8. The Secretary of War may make such rules and regulations as shall be deemed suitable and necessary to control the methods and operations of the persons engaged in this work. *Ib.*
9. The grant of a right or privilege to exist in perpetuity, or as long as the conditions of the grant are fulfilled, is beyond the power of the Secretary of War, and ought not to be made. 544.
10. During the military control of Porto Rico leave or license may be granted an individual to make temporary use of portions of the public domain. *Ib.*
11. The patent or license granted July 11, 1898, to a Spaniard for the manufacture of hemp by steam, etc., in the Philippine Islands for the term of five years is protected by article 13 of the treaty with Spain, if on that date it would, in ordinary times, have been good under Spanish law, notwithstanding American law gives no identical rights. 617.

See CONCESSIONS; MILITARY RESERVATIONS.

LIMITATIONS, STATUTE OF.

See BONDS, 4.

LIQUORS.

See INTOXICATING LIQUORS.

LOST REGISTERED MAIL.

See POSTAL SERVICE, 2-5.

LOTTERY.

See GAMBLING.

MAILS.

See POSTAL SERVICE.

MANIFESTS.

See BILL OF LADING.

MARINE CORPS.

1. Credit should be given a person seeking promotion in the Marine Corps, as well as in the Navy proper, for the time of service of such person as a cadet at the Naval Academy and at sea anterior to commission, in making the promotions provided for by the act of March 3, 1899. 377.
2. The exemption as to age limit with reference to the eligibility to appointment in the Marine Corps is not restricted to those who served in such corps, but extends to all graduates of the Naval Academy who served in the war with Spain. 485.

MEDICINAL DRUGS.

1. Uncompounded medicinal drugs or chemicals, no matter how put up or what is claimed for them, are exempt from tax by the act of June 13, 1898. 272.
2. The class of medicines taxable under the provisions of the law are such as go to the consumer in the unbroken packages in which they are put up by the proprietor, manufacturer, or compounder, with name and disease and the directions for use, without the intervention of a prescription of a physician or pharmacist. *Ib.*
3. The question as to what is an uncompounded medicinal drug, or an uncompounded chemical, being one in fact and not of law, is to be determined according to the technical meaning that has become attached to it. *Ib.*
4. By the act of June 13, 1898, Congress intended to levy tax upon proprietary medicinal articles, or such as assume the character before the public of proprietary, patent, or trade-mark articles, and such medicinal articles as go from the hands of the proprietor, compounder, or manufacturer so put up in packages as to comport with the manner and style of patent, trade-mark, or proprietary medicines in general. *Ib.*

MILITARY RESERVATIONS.

1. The open and notorious use of Government reservations by licensees for other than governmental purposes, and the long-continued exercise of the power to grant such use by the Secretary of War

MILITARY RESERVATIONS—Continued.

without legislative objection, implies the tacit assent of Congress to this custom, but it can not be maintained upon any ground except that of benefit to the public interests. 240.

2. A license or permission can not be given by the commanding officer to a private person to enter a military reservation for the purpose of selling intoxicating drinks. 426.

See LICENSE.

MILITIA.

1. Under the act of April 22, 1898, the appointment of the officers of a militia organization to corresponding grades in the Volunteer Army may be made even though the militia organization was formed subsequent to the call of the President for volunteers. 146.
2. Organizations of State militia, received as a body into the service of the United States as a part of the Volunteer Army under the act of April 22, 1898, are to be maintained as received, and the officers of the same are entitled to enter the service with the grades which their commissions severally indicate. 225, 536.
3. Although such troops retain their distinctive features as State organizations, the governor of a State from which they came could not subsequently displace an officer, but he might fill any vacancy occurring therein. *Ib.*
4. In the absence of any of the appropriation for the maintenance of the militia in the several States, or of arms, ordnance stores, etc., purchased with it, the Government is not required to issue stores in kind to replace such arms, etc., as were consumed, etc., in the war with Spain, nor can it make compensation for such stores. 372.
5. A regiment entering the military service of the United States has the right to maintain its organization, with the number and grade of officers authorized by the laws of the State from which it came. 536.

MORTGAGE.

1. In fixing the amount of tax required upon a mortgage or pledge of stock or property given to secure the payment of a promissory note for a definite and certain sum, the actual value of the stock or property is immaterial. 218.
2. As only one stamp is required upon two separate papers which constitute one transaction, as where a bond or note is given to evidence a debt and the mortgage executed to secure the same, the purposes of the law are fulfilled when the stamp in proper amount is affixed to either and canceled, such stamp being the highest rate required by said papers or either of them. 531.
3. Bonds provided for in a mortgage, to be issued or not as the future action of the mortgagor may determine, are not until issued the subject of taxation or an element in estimating the amount of stamps required for the mortgage. *Ib.*

MUSIC BOOKS.

See COPYRIGHTS, 1, 2, 5.

NATIONAL BANKS.

See BANKS.

NATIONAL GUARD.

See DISTRICT OF COLUMBIA, 5, 6; MILITIA.

NAVAL ACADEMY.

1. A person who took the regular four years' course at the Naval Academy, and received a certificate of graduation, issued pursuant to the act of August 5, 1882, is a graduate of the Academy within the meaning of the "Naval personnel bill." 485.
2. The exemption as to age limit with reference to the eligibility to appointment in the Marine Corps is not restricted to those who served in such corps, but extends to all graduates of the Naval Academy who served in the war with Spain. *Ib.*

NAVAL MILITIA, DISTRICT OF COLUMBIA.

The commanding officer of the National Guard is authorized to nominate candidates for appointment as officers in the naval battalion. 237.

NAVAL OFFICERS.

1. An officer of the Corps of Engineers, not below the relative rank of captain, is eligible for appointment as Chief of the Bureau of Yards and Docks. 47.
2. Under the practical interpretation of section 423, Revised Statutes, naval constructors are treated as officers of the Navy and their relative rank as the actual rank or grade required by that section. *Ib.*
3. The President may appoint the officers of the line and staff of the Navy authorized by the act of May 4, 1898, without the advice and consent of the Senate. 82.
4. A commission issued pursuant to the foregoing act should show upon its face that it is the commission of the President. *Ib.*
5. Credit should be given a person seeking promotion in the Marine Corps, as well as in the Navy proper, for the time of service of such person as a cadet at the Naval Academy and at sea anterior to commission, in making the promotions provided by the act of March 3, 1899. 377.
6. The provisions of the act of March 3, 1899, relative to voluntary or compulsory retirement, applies to the current year ending June 30, 1899, as well as any fiscal year in the future. 380.
7. Officers on the retired list recalled to active duty in case of war would reenter the active list with the rank and pay of the next higher grade. 433.

NAVAL OFFICERS—Continued.

8. Engineer officers who attained the relative rank of commander prior to the passage of the personnel act became entitled to take the actual rank in the line of the Navy. 449.
9. Neither boatswains, gunners, nor warrant machinists are officers of the line of the Navy within the meaning of the Revised Statutes, the acts of August 5, 1882, and March 3, 1899. 620.
10. These officers are not improperly classed in the regulations of the Navy as officers of the line, and may therefore be given the star upon their uniforms. *Ib.*
11. Warrant machinists created by the naval personnel act were not placed in the list of line officers of the Navy. *Ib.*
12. Warrant machinists are not entitled to command. *Ib.*
13. Boatswains and gunners are officers in the line of command, and there is nothing in the classification in the act of 1862 to indicate an intent to make unlawful the exercise of command by them. *Ib.*
14. The order of the President retiring certain officers under the naval personnel law, had the effect to retire Lieutenant-Commander Driggs on June 30, 1899. 657.
15. The retirements under section 8 of the law are to be made from the list of voluntary applicants for the fiscal year then being considered, to take effect on the last day of the fiscal year. *Ib.*
16. Lieutenant McLean is entitled to the grade and rank indicated by his commission, together with the emoluments attached, from and including the 1st day of July, 1899. *Ib.*
17. Vacancies occurring through retirements, as provided under the naval personnel law, are to occur or to be accredited to the fiscal year which ends with the 30th of June. *Ib.*

See NAVY.

NAVIGABLE WATERS.

1. The Mississippi River in Minnesota, both above and below the Falls of St. Anthony, is a navigable river, and can not be bridged without the permission of the United States. 52.
2. The regulation of fisheries in navigable waters within the territorial limits of the several States, in the absence of Federal treaty, is a subject of State rather than of Federal jurisdiction. 214.
3. The Lehigh Valley Railroad Company may exercise its privilege under the New Jersey statutes of closing its drawbridge over the Passaic River a reasonable time for repairs. 312.
4. The United States has the right to control all structures and works which interfere in any manner with the navigable capacity of the navigable waters of the United States which, either by themselves or in connection with other waters, form channels for interstate commerce. 332.
5. The act of July 13, 1892, does not limit the authority of the Secretary of War to grant permission for the construction of a work

NAVIGABLE WATERS—Continued.

of this character to navigable waters which lie wholly within the limits of one State. *Ib.*

6. Canals being artificial waterways or means of commercial transportation, as well as natural lakes and rivers, the same principles may be applied to them that are applied to bridges, turnpikes, streets, and railroads. *Ib.*
7. The Secretary of War can not require changes to be made in the bridge of the Baltimore and Ohio Railroad Company over the Ohio River at the expense of the owner without compensation. 343.
8. If the company itself voluntarily prostrates its bridge, with the intention of constructing another in its place, the Secretary of War has the right to prescribe conditions as to height, length of span, etc. *Ib.*
9. Structures which are unauthorized by law may be summarily removed and without compensation. Those which are authorized by law can only be removed upon making just compensation, unless the authorization by the Federal Government was accompanied with a reservation of a right to change, modify, or remove. *Ib.*
10. Congress has power to improve the navigation of the Ohio River, and for that purpose may actually take such property as is requisite, and may cause the abatement and prostration of all structures which, in its judgment, interfere with its plan of improvement. *Ib.*
11. Congress may regulate the use of all means and instrumentalities used in commerce, whether on sea, navigable rivers and lakes, in harbors, or on land, irrespective of whether a State has attempted to regulate the same matter or not. 501.
12. The power of the United States to regulate commerce is general, absolute, and without limit, either as to the time, place, or detail of its exercise, except as to waters whose entire navigability for commerce is limited to the confines of a single State. 646.
13. This power includes the right to regulate the use of the means and instrumentalities used in commerce. *Ib.*
14. Congress has power to regulate and improve the harbors of navigable waters of the United States, and this carries with it the right to deposit the material removed in making the improvements in any other part of the harbor or navigable waters or other place within its control. 647.

See RIVERS AND HARBORS.

NAVIGATION LAWS.

1. The scale of provisions prescribed by section 23 of the act of December 21, 1898, must be printed in the copy of shipping articles for coastwise steamers and posted. 349.

NAVIGATION LAWS—Continued.

2. For violating the provision of law that there shall not be in any compartment or space on a vessel occupied by passengers more than two tiers of berths, nor more than one person in a berth not double, the master becomes liable to a fine of \$5 for each passenger carried other than cabin passengers. 499.

See SEAMEN.

NAVY.

1. A person who took the regular four years' course at the Naval Academy, and received a certificate of graduation, issued pursuant to the act of August 5, 1882, is a graduate of the Academy within the meaning of section 20 of the "naval personnel bill." 485.
2. Neither boatswains, gunners, nor warrant machinists are officers of the line of the Navy within the meaning of the Revised Statutes, the acts of August 5, 1882, and March 3, 1899. 620.
3. Warrant machinists are not entitled to command. *Id.*
4. The conviction by a general court-martial can not be ratified by the Secretary of the Navy where one member of the court has been relieved by a subordinate without authority of the Secretary and another judge substituted in his stead. 137.

See LICENSE, 1, 2; NAVAL OFFICERS.

NAVY-YARD.

On April 6, 1899, the Washington Navy-Yard being closed at noon, pursuant to an Executive order, in connection with the ceremonies attending the interment of the bodies of the soldiers and sailors whose lives were lost in the war with Spain, the per diem employees of the yard should receive compensation for the entire day. 472.

NEGOTIABLE PAPER.

Negotiable paper may be transferred, so as to pass the title and ownership, by the endorsement of the payee or endorsee thereon, which may be made as well by the agent of such payee or endorsee as by such principal. 637.

NEUTRALITY.

See WAR.

NORTH AMERICAN COMMERCIAL COMPANY.

The North American Commercial Company is liable to the United States for interest upon the sums overdue on account of taxes, rental, and bonus under its lease with the United States. 172.

OATHS.

1. The act of June 7, 1888, with reference to administering oaths to pensioners free of charge, only applies to the officers authorized to administer oaths at the time of the passage of that act. 86.

OATHS—Continued.

2. United States commissioners are not required to administer oaths to pensioners and their witnesses in the execution of pension vouchers free of charge. *Ib.*

OFFICE.

1. The circuit judge appointed as a commissioner under the convention of February 8, 1886, with Great Britain, is entitled to compensation additional to that of his salary, notwithstanding Revised Statutes, sections 1763 and 1765, and the act of July 31, 1894, section 2. 184.
2. This law should not be regarded as enacted by Congress to invade the domain of the treaty-making authority and establishing restrictions upon future occasional and temporary commissionerships created by international agreement, the nature and functions of which neither Congress nor the framers of Article II, section 2, of the Constitution, could wisely undertake or foresee. *Ib.*
3. The word "office," as used in section 2 of the act of 1894, is to be presumed, in the absence of indications to the contrary, not to embrace such commissionership, because it is not what is called a constitutional office. *Ib.*
4. Incompatibility in law exists where the nature and duty of the two offices are such as to render it improper, from considerations of public policy, for one incumbent to hold both, and does not necessarily arise when the incumbent places himself for the time being in a position where it may be impossible for him to discharge the duties of both offices. 237.

See ARMY OFFICER, 88.

OFFICERS.

See ARMY OFFICERS; NAVAL OFFICERS.

OHIO RIVER.

See NAVIGABLE WATERS, 7-10.

OPINIONS.

See ATTORNEY-GENERAL.

ORDNANCE.

1. In the absence of any of the appropriation for the maintenance of the militia in the several States, or of arms, ordnance stores, etc., purchased with it, the Government can not issue to the several States stores in kind to replace such as were exhausted, consumed, or impaired by use in the war with Spain; nor can it make compensation for such stores, as they were the property of the United States. 372.
2. Such stores belonging to the several States, taken or accepted by the Government for use in the war with Spain, should not be returned in kind, but should be paid for at the price agreed

ORDNANCE—Continued.

upon, or, in the absence of an agreement, what they were worth. *Ib.*

3. Under a contract for the construction of a certain gun, 85 per cent of the sum appropriated was to be paid as the work progressed, and the remainder upon its completion and test. The gun was completed and stood the regular proof test, but upon being subjected to the ordnance test, on the fifteenth round it was destroyed. *Held*, That the contractor was entitled to the final payment. 465.

See LICENSE, 1, 2.

PARDON.

1. A recruiting officer has the right to reject a candidate for enlistment in the Army whose service during his previous term was not honest and faithful, notwithstanding the President's pardon of the offense. 36.
2. While the President's pardon restores a criminal to his legal rights and fully relieves him of the disabilities legally attaching to his conviction, it does not destroy an existing fact that his service was not faithful and honest. *Ib.*
3. Congress has no power to abridge the effect of the President's pardon. *Ib.*
4. A person convicted of desertion from the military service and afterwards pardoned by the President, would be restored by reason of the pardon to all the rights and privileges of a citizen which he had anterior to such conviction. *Ib.*

PARIS EXPOSITION.

1. The commissioner-general of the Paris Exposition has no authority to let a contract for the printing and publication of a catalogue of the United States exhibit, etc., in which the contractor is to receive no money from the United States, but is to derive his compensation therefor from the proceeds of the sale of the catalogue and the insertion of advertisements therein. 388.
2. Any money that might be derived by the commissioner-general through the granting of concessions, or the sale of a catalogue, belongs to the United States and should be turned into the Treasury. *Ib.*

PATENTS.

See LICENSE, 1, 2, 11.

PAY.

See ARMY, 9; ARMY OFFICERS, 19; CONSULAR SERVICE, 1-3; NAVY-YARD; OFFICE, 1.

PAYMENTS.

On questions of disbursements of moneys or payment of claims the Attorney-General should not render opinions. 583.

PENALTY.

See **FORFEITURES; NAVIGATION LAWS, 2.**

PENSIONS.

1. United States commissioners are not required to administer oaths to pensioners and their witnesses in the execution of pension vouchers free of charge. 86.
2. The act of June 7, 1888, with reference to administering oaths to pensioners free of charge only applies to the officers authorized to administer oaths at the time of the passage of that act. *Ib.*

PHILIPPINE ISLANDS.

1. Under the treaty with Spain the United States obligated itself to convey from the Philippine Islands to Spain only such Spanish soldiers as were actually made prisoners of war either by the United States or by the insurgents. 383.
2. Troops remaining under arms, under the control and direction of Spanish officers, are to be removed at the expense of the Spanish authorities. *Ib.*
3. As the claim of certain aliens, natives of the Philippines, for admission, appears meritorious and no possible competition with American labor will be involved, and as they will be returned to their country in due time, there is no conclusive objection to the Secretary of the Treasury exercising his favorable administrative discretion in admitting them. 495.
4. The laws of Spain concerning industrial property were contemplated by the framers of article 13 in providing protection for Spanish rights. 617.
5. The patent or license granted July 11, 1898, to a Spaniard for the manufacture of hemp by steam, etc., in the Philippine Islands is protected by the treaty with Spain, if on that date it would, in ordinary times, have been good under Spanish law, notwithstanding American law gives no identical rights. *Ib.*

See **CABLES, 4; COPYRIGHTS, 6.**

PLEDGE.

See **INTERNAL-REVENUE LAWS, ETC., 27, 28.**

"PORT."

The term "port" may comprehend the city or town occupied by the importers, merchants, and others, but it is not confined in its extent or its limits to the town. It includes the harbor, roadstead, and shores, and all other natural and local incidents which go to make up a locality which comprises both land and water. 306.

PORTO RICO.

1. During the military control of Porto Rico leave or license may be granted an individual to make temporary use of portions of the public domain. 544.

PORTO RICO—Continued.

2. The power to dispose permanently of the public lands and property in Porto Rico rests in Congress, and in the absence of a statute conferring such power can not be exercised by the Executive Departments of the Government. *Ib.*
3. In Porto Rico the Crown of Spain was the owner, for public use, of the proprietary rights of the natural beds or channels of rivers, both navigable and unnavigable, to the extent covered by the waters in their ordinary greatest swells. 546.
4. Neither the President nor the War Department has power to grant a concession of the right to use the water power of the River Plata in Porto Rico. *Ib.*
5. Any complete and vested right which a person had at the time the treaty of Paris took effect, to the use of the waters of the River Plata, should be respected by the United States. 546.
6. A concession for the construction of a certain electric tramway in Porto Rico being inchoate and incomplete and lacking certain public action necessary to be taken by the public authorities representing the Crown of Spain before it could go into effect as a complete grant, the War Department has no authority to grant or complete such concession. 551.
7. Merchandise from the island of Porto Rico introduced into the ports of the United States is by law required to pay the same duties that would be charged upon merchandise imported from a foreign country, and the President has no authority to alter or modify the laws under which duties are required to be paid. 560.
8. The admission of merchandise into the ports of the United States from such conquered territory is governed solely by existing laws passed by Congress, and the President has no power to add to or detract from the force and effect of such laws. *Ib.*

See COPYRIGHTS, 6; CUBA.

POSTAGE STAMPS.

1. When the word "securities" is used in the property sense, it refers to bonds, mortgages, certificates of deposit, certificates of stock, etc. In this sense postage stamps are not investments or securities. 40.
2. The Postmaster-General should advertise for proposals for the work of engraving and printing United States postage stamps, for which work the Bureau of Engraving and Printing may be permitted to compete. *Ib.*
3. Postage stamps are supplies within the meaning of section 3709, Revised Statutes. *Ib.*

PUBLIC WORKS

See RIVERS AND HARBORS.

POSTAL SERVICE.

1. An advertising circular, containing a picture and description of a slot machine designed for the purpose of gambling or the distri-

POSTAL SERVICE—Continued.

- bution of prizes dependent upon lot or chance, can not be excluded from the mails of the United States under the lottery law of September 19, 1890. 198.
2. The act of February 27, 1897, authorizes the Postmaster-General to establish, as part of the system of registration, rules providing for indemnity for foreign as well as domestic first-class registered matter lost in the mail. 290.
 3. The rules promulgated pursuant to said act apply to both domestic and foreign registered mail matter, and the provisions of the postal convention relative to loss of registered matter may become operative or to make the Department liable to this limited extent for foreign first-class registered matter lost in the mails. *Ib.*
 4. The registry provisions of the Postal Convention of Washington are not operative in or as to the United States, but its liability is only that imposed by the act of 1897 and the rules of the Post-Office Department made in pursuance thereof. 363.
 5. Until Congress shall otherwise provide with reference to indemnity for lost registered mail, the Postmaster-General may either pay the limited indemnity on foreign matter, as provided in the act of 1897, irrespective of what other countries may do, or so amend the rules of the Department as to limit the indemnity to lost registered matter originating in and addressed to a place within the United States. *Ib.*
 6. Free-delivery offices as a class, and not offices formerly free-delivery offices, were intended to be within Postal Rule I and the present Rule III. 613.
 7. When free delivery is discontinued at a post-office such office ceases to be under the civil-service rules. *Ib.*
 8. In the exercise of his discretion the Postmaster-General abolished the free-delivery service at Huron, S. Dak., on January 15, 1895, and in consequence certain carriers were separated from the service. *Held*, That on the reestablishment of free-delivery service at that place the former carriers could not be reinstated. 663.
 9. To entitle a person to reinstatement in the civil service under Rule IX by reason of the reduction of force, such reduction must be one required by law and not one caused by the exercise of a discretionary power vested in an executive officer. *Ib.*

See POSTAGE STAMPS.

POST EXCHANGE.

See CANTEEN.

POWER OF ATTORNEY.

See CHECKS, 3; INTERNAL-REVENUE LAWS, ETC., 28.

PRESIDENT.

1. Many things may be done by the head of an Executive Department without the actual signature of the President, which, when done,

PRESIDENT—Continued.

- are his acts; but in such case the documents should declare it to be the act of the President performed by the head of the Department as his representative. 82.
2. The President may appoint the officers of the line and staff of the Navy authorized by the act of May 4, 1898, without the advice and consent of the Senate. *Ib.*
 3. If the President is satisfied that cholera, yellow fever, smallpox, or plague exists in this country, and that it is necessary, in order to prevent its spread, to adopt and enforce certain rules and regulations, he has authority to do so under the act of March 27, 1890, notwithstanding the provisions of the act of February 15, 1893. 106.
 4. Regimental officers of such regiments as may be formed by contributions of companies from two or more States are to be appointed by the President of the United States, under the constitutional provisions which make him Commander in Chief of the Army and Navy and which authorizes him to appoint all officers of the United States whose appointment is not otherwise provided by law. 135.
 5. If a battalion is made up of companies contributed by two or more States the officers of the battalion as such must be appointed by the President. 146.
 6. For the purpose of disbanding the insurgent forces in Cuba, the President is authorized to pay some or all of the soldiers of such forces either out of the revenues of the island or out of the emergency fund provided by the act of January 5, 1899. 301.
 7. The President is authorized to do whatever he finds necessary or expedient for the proper administration of government in Cuba, having in view the pacification of the island and the establishment of order and industry. *Ib.*

See CABLES, 2, 5, 10: PARDON; SECRETARY OF WAR, 2.

PRIZE.

1. Section 4625, Revised Statutes, relating to prizes, refers only to property actually captured, and not to property which has been destroyed without ever having been actually seized or in the possession of the forces of the United States. 171.
2. The officers and men of the U. S. S. *Hawk* are not entitled to prize money for the destruction of the Spanish steamer *Alphonso XII*. *Ib.*
3. If at the time of her destruction she was a ship or vessel of war in the service of Spain, bounty may be recovered under section 4635, Revised Statutes. *Ib.*
4. Offers of prize, etc., are to be excluded from packages of tobacco. 181.
5. Proceedings for adjudication of bounty for the capture or destruction of a vessel may be begun at the instance of the Secretary

PRIZE—Continued.

of the Navy in any district that he may designate, and upon his failure to designate a district within three months after the vessel has been captured or destroyed, the claimants may institute proceedings. 205.

6. Certain tobacco belonging to the Portuguese vice-consul at Gibara, Cuba, was seized and condemned as prize, together with the Spanish vessel of which it formed the cargo. *Held*, That its condemnation was legal, and that the demand of this merchant, whose status was not affected by his consular character, is without substantial merit. 327.
7. The opinion of the Navy Department, that it is proper and expedient to release the steamship *Abbey*, seized at Batangas, Philippine Islands, by Admiral Dewey, to the American claimant, concurred in. 390.

PRIZE COURTS.

Prize courts are, in a sense, governed by the law of nations relating to war. 328.

See BOUNTY.

PROMISSORY NOTES.

Upon promissory notes a stamp is required of the value of 2 cents for a sum not exceeding \$100, and for each \$100 or fractional part thereof in excess of \$100, 2 cents additional. 218.

See MORTGAGES, 2.

PUBLIC LANDS.

1. The power to dispose permanently of the public lands and property in Porto Rico rests in Congress, and in the absence of a statute conferring such power can not be exercised by the Executive Departments of the Government. 544.
2. Leave or license to use portions of the public domain may be granted to individuals. *Ib.*
3. Under Spanish laws, lands under tide water to high-water mark in the ports and harbors in the Spanish West Indies belonged to the Crown, and as such, by treaty of cession, have become a part of the public domain of the United States. *Ib.*
4. The officers of the Hawaiian government have no authority to sell or otherwise dispose of the public lands in the Hawaiian Islands, and any such sale or agreement to sell are absolutely null and void as against the Government of the United States. 574.
5. By the resolution of annexation the local government of Hawaii was deprived of all authority to dispose of public lands in any manner whatsoever, except by virtue of special laws enacted by Congress. *Ib.*
6. The Hawaiian government has no power to convey or confirm title to public lands where conditional sales or entries were made

PUBLIC LANDS—Continued.

prior to the resolution of annexation and the conditions entitling such persons or entrymen to a grant have been subsequently performed. 627.

7. By the resolution of annexation the public property of Hawaii, including the lands, became vested in the United States, and only by their authority or direction can these lands be disposed of. *Ib.*
8. Congress having failed to legislate on the subject of public lands for the Hawaiian Islands, the government of Hawaii is not reinvested with its former power of their disposition. *Ib.*
9. All interest of the Republic of Hawaii in public lands at the time the resolution of annexation took effect were thereby transferred to the United States, and thenceforth the officials of Hawaii were without power to convey by grant or cession the legal or equitable title of the United States. *Ib.*

PUBLIC PROPERTY.

When property is ceded by one nation to another its disposition and control are thereafter regulated and governed by the laws of the new owner. 546.

PUBLIC WORKS.

1. The administration of the United States in Cuba being of a military nature and merely temporary, no action should be taken to bind the island or any of its municipalities to large expenditures, except upon grounds of immediate necessity. 310.
2. The military authorities in Cuba have power to direct the municipal authorities to suspend public works and improvements for proper public reasons, even where such suspension interferes with rights that have previously vested. 520.
3. Any rights of Dady & Co. for the construction of certain works in Havana, if vested, are preserved by the treaty of Paris. 526.
4. In the exercise by the United States of the powers of municipal government it may provide the methods, terms, and conditions under which internal improvements may be carried on, or forbid them to be carried on, although inchoate or even completed contracts therefor have previously been entered into. *Ib.*

See CONTRACTS; COURT-MARTIAL; RIVERS AND HARBORS.

“PUT.”

The written evidence of a transaction called in brokers' parlance a “put,” being an agreement on the part of the signer to buy stock, the opportunity to purchase being entirely dependent upon the disposition of the bearer, or the party to whom the paper is given, is not taxable under the war-revenue law. 447.

QUARTERMASTER-GENERAL.

See ARMY OFFICERS, 20.

REAPPRAISEMENT.

1. The action of the collector in denying a reappraisement because the importer refused to answer proper interrogatories propounded to him may be reviewed by the Board of General Appraisers on a protest, and next by the circuit court on an application for review. 456.
2. An importer making such refusal is not entitled to a reappraisement, but the original appraisement becomes final and conclusive. *Ib.*

REBATE CHECKS.

Rebate checks which are given by a railroad company to passengers who purchase their tickets from the conductor aboard the train do not require a stamp under the provisions of the war-revenue law. 248.

RECEIPTS.

1. A receipt is a writing acknowledging the taking of money or goods, and may or may not be negotiable, as the party by whom it is given may choose to make it or local law may provide. 283.
2. All receipts given for goods, merchandise, or property held on storage in a warehouse must be stamped. *Ib.*
3. The receipt given by the United States Express Company when transporting money for the Government must be stamped. 192.
4. An excess baggage receipt given by a railroad company to a passenger for excess weight of baggage need not be stamped. 246.

RECORD AND PENSION DIVISION, WAR DEPARTMENT.

1. The effect of the act of March 2, 1899, is to change the rank and pay of the Chief of the Record and Pension Division of the War Department and not to create a new office. 480.
2. Upon the approval of the act, the chief of such division became entitled to the increased rank and pay without the necessity of a nomination by the President and confirmation by the Senate. *Ib.*
3. The acceptance or nonacceptance by the chief of the new commission, with the added rank, under the act of March 2, 1899, will not change his official status or in any manner affect him. *Ib.*

REDEMPTION.

See STAMPS, 2, 3.

REGISTERED MAIL.

1. The Postmaster-General is authorized to establish, as part of the system of registration, rules providing for indemnity for foreign as well as domestic first-class registered matter lost in the mail. 290.
2. The rules promulgated apply to both domestic and foreign registered mail matter, and no further legislation is required in order

REGISTERED MAIL—Continued.

that the provisions of the Postal Convention relative to loss of registered matter may become operative or to make the Department liable to this limited extent for foreign first-class registered matter lost in the mails. *Ib.*

3. The registry provisions of the Postal Convention of Washington are not operative in or as to the United States, but its liability is only that imposed by the act 1897 and the rules of the Post-Office Department made in pursuance thereof. 363.

REGISTRY.

1. The issuance of registry to a vessel, entitling it to carry national colors, is an act of sovereignty, although the register itself is not the only document recognized by the law of nations as indicative of the ship's national character. 578.
2. The registration laws of Hawaii have been abrogated as a necessary consequence of its annexation to the United States. *Ib.*
3. An order of the Executive suspending the issuance of Hawaiian registers would be a legal exercise of power under the resolution of Congress annexing Hawaii. *Ib.*
4. The Hawaiian authorities can not in anywise certify to the national character of a vessel, as such character can no longer be attributed to vessels owned by the inhabitants of the islands. *Ib.*
5. The *Scipio*, a foreign-built steamship purchased by the Navy Department for use in the war with Spain, and subsequently sold to and owned by an American citizen, is not entitled to registry under the laws of the United States. 566.
6. The regulation of commerce and navigation being entirely within the control of Congress, there is no authority for an Executive Department to make or enforce rules or regulations relative to the registry of vessels or kindred matters connected with such subjects. *ib.*

REGULATIONS.

1. The act authorizing the acceptance of bonds and undertakings of surety and fidelity companies does not permit the imposition of conditions and regulations by Government officials relative to the question of charges, etc. 421.
 2. No mere omission or failure to provide for contingencies which it might have been wise to have specifically provided for justify any judicial or executive addition to the language of a statute. 405.
 3. A regulation made in pursuance of an act of Congress has the force of law. 568.
- See ARMY, 4, 5; COPYRIGHTS, 5; CRIMES AND OFFENSES, 1; CUSTOMS LAWS, etc., 19, 27.

REINSURANCE POLICIES.

Reinsurance policies need not be stamped under the war-revenue law of June 13, 1898. 318, 376.

RENT.

1. In an action for use and occupation or for mesne profits, where the recovery is of a sum in the nature of rent, interest is allowed on each annual sum from the end of the year. 172.
2. The North American Commercial Company is liable for interest on the sums overdue on account of rent, etc. *Ib.*

RESERVATIONS.

See **MILITARY RESERVATIONS.**

RESIGNATION.

The resignation of a military officer does not take effect until accepted by the proper superior authority. 237.

RETIREMENT.

1. The act of June 20, 1882, relative to retirement, applies to an officer of the Regular Army who is 64 years of age, temporarily serving under a volunteer commission, without affecting his status in the volunteer service, but does not apply to a volunteer officer, not being in the Regular Army, who is 64 years of age. 199.
2. The provisions of the act of March 3, 1899, relative to voluntary or compulsory retirement, applies to the current year ending June 30, 1899, as well as any fiscal year in the future. 380.
3. Officers on the retired list, under the provisions of the naval-personnel law, recalled to active duty in case of war, would reenter the active list with the rank and pay of the next higher grade. 433.
4. The retirements under section 8 of the naval personnel law are to be made from the list of voluntary applicants for the fiscal year then being considered, to take effect on the last day of the fiscal year. 657.

RIPARIAN RIGHTS.

1. In Porto Rico the Crown of Spain was the owner, for public use, of the proprietary rights of the natural beds or channels of rivers, both navigable and unnavigable, to the extent covered by the waters in their ordinary greatest swells. 546.
2. Any complete and vested right which a person had at the time the treaty of Paris took effect to the use of the waters of the River Plata, should be respected by the United States. *Ib.*

RIVERS AND HARBORS.

1. In the act providing a deep-water harbor for commerce and of refuge at San Pedro, Cal., it was the purpose of Congress that it should be a deep-water harbor in the sense of having a sufficient depth of water to accommodate vessels of large draft, but not necessarily vessels of the greatest draft now constructed. 138.
2. It was not the intention of Congress that out of the appropriation made the harbor should be equipped with piers, jetties, and

RIVERS AND HARBORS—Continued.

channels necessary for the highest condition of usefulness and efficiency. *Ib.*

3. Under this act the Secretary of War is not called upon to make further plans, specifications, or estimates for other work not included within the plans and specifications adopted by the court. *Ib.*
4. With reference to the improvement of the outer bar of the harbor at Brunswick, Ga., under the river and harbor acts of 1894 and 1896, the requirements as to time have been sufficiently complied with in respect to the certificate and payment of \$100,000, and the certificate may be authorized. 156.
5. There being a question as to the assignment of a contract under the river and harbor act, all parties may execute an agreement in the nature of a trust to embody a release to the United States as to a present payment and an agreement to release as to future payments, and providing for payment to a trustee for disbursement. *Ib.*
6. The word "assigns" in the acts of 1894 and 1896 is intended to point out the party or parties who took over, by formal assignment, all rights to or interest in a contract, or such measure of rights and interest as carve out a complete share in the undertaking itself, with all its risks and incidents. *Ib.*
7. The War Department having given its consent and approval to the dredging of a canal which is wholly within the State of Texas, there is no reason why such permission should be withdrawn. 332.
8. Clause 2 of the proviso to section 7 of the act of July 13, 1892, does not limit the authority of the Secretary of War to grant permission for the construction of a work of this character to navigable waters which lie wholly within the limits of one State. *Ib.*
9. The act of March 3, 1899, for deepening the channel north of Pelican Island, from Galveston Harbor to Texas City, Tex., makes an appropriation of \$250,000 for the work. 489.
10. There is no authority for paying out of this appropriation any expenses for making the contract, inspecting or superintending the work, unless it be indirect through a provision in the contract that these expenses shall be paid by the contractors and charged against their compensation. *Ib.*
11. Whenever Congress in the exercise of its power to regulate commerce makes any rule or regulation in harbors or elsewhere, such regulations necessarily supersede any that the State may have made on the same subject within its limits. 501.
12. Congress has the power to establish harbor lines or modify existing ones in navigable waters within the limits of a State, although such State has already established such harbor lines. *Ib.*

RIVERS AND HARBORS—Continued.

13. The Secretary of War has the power to establish a harbor line for the Tacoma Harbor or modify the existing one in the harbor of Seattle, as he shall determine. *Ib.*
14. The Secretary of War has no authority to use any portion of the \$170,000 appropriated by the river and harbor act of March 3, 1890, for the improvement of the Missouri River above Sioux City, for improvements at or in front of that city. 519.
15. The court-martial that tried Captain Carter was justified in its finding of guilty upon the charges and specifications relating to the contracts of September, 1896, for Savannah Harbor, and the finding and sentence of the court with respect thereto should be approved. 589.
16. The authorities of the city of Chicago have no legal power to prohibit the Government contractors from dumping material dredged from the harbor at Chicago within the limits selected and designated by the Secretary of War. 646.
17. Congress has power to regulate and improve the harbors of navigable waters of the United States, and this carries with it the right to deposit the material removed in making the improvements in any other part of the harbor or navigable waters or other place within its control. *Ib.*

SABINE PASS.

The location of the custom-house outside of the corporate limits of the municipality known as Sabine Pass complies with the act of June 23, 1898, and it is not necessary that it should be removed to a point within the corporate limits. 306.

SALARY.

See ARMY, 9; ARMY OFFICERS, 19; CONSULAR SERVICE, 1-3; NAVY-YARD; OFFICE, 1.

SAN PEDRO HARBOR, CALIFORNIA.

In the act providing a deep-water harbor for commerce and of refuge at San Pedro, Cal., it was the purpose of Congress that it should be a deep-water harbor in the sense of having a sufficient depth of water to accommodate vessels of large draft, but not necessarily vessels of the greatest draft now constructed. 138.

SEAL FISHERIES.

1. The presence of a shotgun on a sealing vessel was made a violation of article 6 of the regulations concerning the seal fisheries by Congress, but such principle does not apply to British vessels in the absence of a British statute to the same effect. In the absence of such British statute it is improper to seize a British vessel unless there be good reason to believe she had been actually guilty of violating article 6. 64.

SEAL FISHERIES—Continued.

2. The seizure of a vessel for violation of the Bering Sea award act, and of the President's proclamation, in that a gun and ammunition were aboard, is equivalent to a seizure under article 6 of the regulations concerning the seal fisheries, enacted into law by the Governments of the United States and Great Britain. *Ib.*
3. The use of firearms excepting outside of Bering Sea, during the open season is forbidden. *Ib.*

SEAMEN.

1. The master of an American steamship requested the discharge of a seaman, the latter joining in the request. The log book showed that on a certain day the sailor refused to work, alleging sickness, which proved to be intoxication, and the following day he was unable to work from consequent illness. For these reasons the master deducted from his wages four and eight days' pay, respectively. *Held*, The consul-general was justified in discharging the seaman. 212.
2. If a seaman is discharged because of unusual or cruel treatment, he is entitled to one month's extra wages allowed by statute, and in such cases the consul-general is authorized to exercise some reasonable discretion in determining this extra allowance in reference to actual or anticipated ill treatment. *Ib.*
3. The master of the vessel had no legal right to impose and collect the fines indicated, as the entries in the log book did not amount to satisfactory evidence of unlawful refusal or neglect to work when required. *Ib.*

SECRETARY OF AGRICULTURE.

The Secretary of Agriculture may slaughter such sheep as are adjudged to be infected with a contagious disease or exposed to infection, and in making the compensation provided by the act of August 30, 1880, he is limited to those which were exposed to infection but not then infected. 390.

SECRETARY OF THE INTERIOR.

1. Congress has the right to place the control of the occupancy and use of forest reservations in the hands of the Secretary of the Interior for their preservation. 266.
2. The expenditures authorized by the act of 1899, and incurred by the Director of the Census, are proper and lawful, and the Secretary of the Interior should approve them, if it is his duty to do so at all, as a ministerial act, and not as one in which he is to exercise judgment or discretion touching the wisdom or advisability of the expenditure. 413.
3. The Secretary of the Interior is not required to approve the selection of appointees, the plan for taking the census, or for making contracts for supplies, etc. *Ib.*
4. The Director of the Census and his subordinates are not subject to the supervision, control, or direction of the Secretary of the Interior. *Ib.*

SECRETARY OF THE NAVY.

The conviction by a general court-martial properly called can not be ratified or affirmed by the Secretary of the Navy where one member of the court has been relieved by a subordinate without authority of the Secretary and another judge substituted in his stead. 137.

SECRETARY OF STATE.

The application of the Commercial Cable Company for leave to land its cable in the United States is within the jurisdiction and control of the Department of State, acting for the President. 408.

SECRETARY OF THE TREASURY.

1. The act of July 1, 1898, making an appropriation "to enable the Secretary of the Treasury to pay" a certain individual a specified amount, being mandatory, the Secretary has no discretion to pass upon the fact whether such amount or any portion thereof ought to be paid. 295.
2. The authority vested in the Secretary of the Treasury by the act of August 18, 1894, to determine finally and conclusively whether or not a Chinese person shall be admitted to this country, may be exercised in such manner as will keep faith and do no injustice to a Chinese who seeks to return. 324.
3. The Secretary of the Treasury can not, by his regulation, alter or amend a revenue law so as to insert into the body of the statute a limitation which Congress did not think it necessary to prescribe. 405.
4. The Secretary of the Treasury is vested with power to make and apply such rules relative to the question of immigration as may be shown from time to time to be necessary and convenient. 460.
5. The separation on board vessels of those who should and who should not be subjected to examination and listing is a matter of practical administration intended to be regulated by the Secretary of the Treasury. *Ib.*

See FRAUD.

SECRETARY OF WAR.

1. The approval of the Secretary of War is required for projections beyond the building line in that part of the city of Washington formerly known as Georgetown. 9.
2. The Secretary of War is the regular constitutional organ of the President for the administration of the military establishment of the nation, and as such the rules and orders promulgated through him must be received as acts of the Executive, and binding upon all within the sphere of his legal and constitutional authority. 54.
3. The Secretary of War has no authority to make a regulation limiting to a specified time, expiring on a given date, the right of

SECRETARY OF WAR—Continued.

promotion of an enlisted man who holds a certificate of eligibility provided for by the act of July 30, 1892. *Ib.*

4. The Secretary of War would not be prohibited from approving the plan and location of a bridge across boundary waters if acts of authorization were passed by the legislatures of the States interested. 332.
5. The grant of a right or privilege to exist in perpetuity, or as long as the conditions of the grant are fulfilled, is beyond the power of the Secretary of War, and ought not be made. 545.

See BRIDGES; CONTRACTS, 20, 21; CUSTOMS LAWS, ETC., 1; LICENSE.

SECURITY.

The word "security," as used in the act of 1877 (1 Supp. R. S., 136), is an evidence of public debt, as a bond, or a certificate of deposit, or other subject of investment. 40.

SEIZURE.

See CONFISCATION.

SHIPPING ARTICLES.

The scale of provisions prescribed by section 23 of the act of December 21, 1898, must be printed in the copy of shipping articles for coastwise steamers and posted. 349.

SPAIN.

1. Under the treaty with Spain the United States obligated itself to convey from the Philippine Islands to Spain only such Spanish soldiers as were actually made prisoners of war either by the United States or by the insurgents. 383.
 2. Troops remaining under arms, under the control and direction of Spanish officers, are to be removed at the expense of the Spanish authorities. *Ib.*
 3. The laws of Spain concerning industrial property were contemplated by the framers of article 13 in providing protection for Spanish rights. 617.
 4. The laws of Spain concerning industrial property explained. 617.
- See CUBA; PRIZE; PHILIPPINE ISLANDS.

STAMPS.

1. The Postmaster-General should advertise for proposals for printing postage stamps. 40.
2. The Commissioner of Internal Revenue has authority, with the approval of the Secretary of the Treasury, to make regulations looking to the redemption of unused documentary stamps issued under the act of June 13, 1898. 568.
3. In the absence of such rules the Commissioner of Internal Revenue may cause such unused stamps to be redeemed. *Ib.*

STAMP TAX.

See INTERNAL-REVENUE LAWS AND REGULATIONS.

STATE BANKS.

See BANKS.

STATE DEPARTMENT.

An appointment by the Secretary of State, without reference to or conformity with the regulations prescribed for appointments in classified service, made pursuant to the act of July 3, 1898, authorizing the temporary employment of stenographers and typewriters in his Department, is lawful. 556.

See CONSULAR SERVICE.

STATE MILITIA.

See MILITIA.

STATUTORY CONSTRUCTION.

1. The transfer of a separate statute, or part thereof, from a particular act to a general revision does not ordinarily alter its significance. 40.
2. Revised Statutes, section 5600, relating to the construction to be placed upon a statute, does not prevent the application of the ordinary principles which permit courts to resort to the context and the subject-matter of the sections immediately associated with it. *Ib.*
3. Statutory meaning, so far as it is artificial and not the natural and usual meaning, can be applied only to the exact phrase defined and to the whole of it, not to a selected portion. *Ib.*
4. A general act is not to be construed to repeal a previous particular act, unless there is some express reference to the previous legislation on the subject, or unless there is a necessary inconsistency in the two acts standing together. 106.
5. The regulation of a Department of the Government is not to control the construction of an act of Congress when its meaning is plain, but when there has been a long acquiescence in a regulation, and by it rights of parties for many years have been determined and adjusted, it is not to be disregarded without the most cogent and persuasive reasons. 163.
6. The meaning of section 1733, Revised Statutes, being in doubt, it is proper to resort to the construction which has been placed upon it by the State and Treasury Departments, which have to do with its execution. *Ib.*
7. Where words are sometimes used in different senses their meaning in a statute must always be construed in reference to the subject matter of the enactment. 178.
8. The fact that a treaty provision annuls and supersedes the law of a particular State upon the same subject is no objection to the validity of the treaty. 214.
9. The phrase "to enable" is in words only permissive and is governed by and does not govern the context. 295.
10. The intent of the lawmaker is to be found in the language that he has used. 353.

STATUTORY CONSTRUCTION—Continued.

11. The actual intention of the framers or parties to a written document is generally to be determined by the meaning of the language used to express it. 363.
12. Where language is doubtful, and it is fairly susceptible of different meanings, the consequence of a particular construction may be considered in determining which construction should be adopted, but where the language is plain, and when read in the light of existing facts and the object intended to be attained it fairly admits of but one meaning, the consequences must be serious to warrant a departure from such plain meaning. *Ib.*
13. The language of section 8 of the act authorizing the slaughter of infected animals is in terms merely permissive and not mandatory. 390.
14. No mere omission or failure to provide for contingencies for which it might have been wise to provide justifies any judicial or executive addition to the language of a statute. 405.
15. The parliamentary history of an act is inadmissible to explain its meaning. 426.
16. The meaning attached to an act by its framers or by the members of either House of Congress can not control its construction. *Ib.*
17. No part of an act is to be regarded as meaningless or superfluous if a construction can be legitimately found which will preserve and make it effectual. *Ib.*
18. It is to be presumed that the legislature means precisely what it says, and the effort of the interpreter should be to give force and effect to every word, paragraph, and section of the act. *Ib.*
19. The designation of one class of individuals as forbidden to do a certain thing raises a just inference that all other classes not mentioned are not forbidden. *Ib.*
20. An act of Congress should receive a reasonable construction and be so enforced as to produce as little injury and inconvenience as may be consistent with its terms and object. 460.
21. A penal statute is to be construed strictly, and its provisions can not be extended by construction, implication, or otherwise beyond the plain meaning of its language. 475.
22. All parts of an act relating to the same subject should be considered together and not each by itself. 556.
23. General words may be restrained so as to apply only to the subject within the purview of the act, though literally they would embrace a much larger class. *Ib.*
24. Whenever a power is given by statute, everything for the making of it effectual or requisite to attain the end is implied. 665.
25. Unless otherwise specially stated, the statutory provisions for notice, etc., of a given number of days are usually considered to include Sundays and holidays in the count. 78.

SUBSIDY BONDS.

See UNION PACIFIC RAILROAD.

SUGAR.

See CUSTOMS LAWS AND REGULATIONS, 16.

SUITS.

1. The Attorney-General may dismiss or discontinue suits in which the Government is interested; a fortiori, he may terminate the same upon terms, at any stage, by way of compromise or settlement. 491.
2. The superior court of Sutter County, Cal., granted a temporary injunction on a suit by the county of Sutter, restraining the Red Dog Mining Company, operating under a license from the California débris commission, from mining by the hydraulic process. *Held*, in the absence of any question touching the validity of the powers granted to the California débris commission, the Government should not intervene in the suit. 554.

SUPPLIES.

See CENSUS BUREAU, 1; CONTRACTS; CUBA, 1.

SURETY COMPANIES.

1. If the laws of a State under which a surety company is incorporated limit the amount of liability which can be incurred on account of any one partnership or association, and if a greater amount of liability is incurred it is to be secured by a collateral agreement of indemnity, such provision is thereby made a part of its charter, and to that extent is its corporate powers restricted in its dealings with the United States. 421.
2. The act authorizing the acceptance of bonds and undertakings of surety and fidelity companies does not permit the imposition of conditions and regulations by Government officials relative to the question of charges, etc. *Ib.*

TACOMA HARBOR.

See RIVERS AND HARBORS, 13.

TAXES.

The constitutional requirement with reference to uniformity in the imposition of taxes, imposts, etc., is satisfied when a particular impost is uniform upon all subjects of the same kind or class. 192.

See CUSTOMS LAWS, ETC.; INTERNAL REVENUE LAWS, ETC.; NORTH AMERICAN COMMERCIAL COMPANY.

TELEGRAPHS.

See BIDS; CABLES.

TIDE-WATER LANDS.

See CUBA, 18.

TONNAGE TAX.

1. In the resolution annexing the Hawaiian Islands Congress affirmatively indicated its intent that such laws as our tonnage tax are to remain undisturbed until it shall provide a form of government for such islands or until the commission shall advise and Congress shall enact legislation therefor. 150.
2. The fact that the Hawaiian Islands have been annexed to the United States does not relieve vessels from such ports from being considered as from foreign ports and as coming under the laws governing tonnage tax. *Id.*

TRAMWAYS.

See PORTO RICO, 6.

TREATIES.

The fact that a treaty provision annuls and supersedes the law of a particular State upon the same subject is no objection to the validity of the treaty. 214.

See SEAL FISHERIES.

TREASURY DEPARTMENT.

See CUSTOMS SERVICE; SECRETARY OF THE TREASURY.

ULTRA VIRES.

A corporation is liable for the acts of its officers, agents, or servants done by its authority, and for every wrong it commits, or for quasi-criminal acts, and in such case the doctrine of ultra vires has no application. 122.

UNION PACIFIC RAILROAD.

The Government directors of the Union Pacific Railway Company are chargeable with no duties or obligations in respect to the proceedings for the enforcement of the claim of the United States in the matter of the indebtedness of the Kansas Pacific Railway Company. 289.

2. While the United States is named as a defendant in the bill of complaint to foreclose the mortgage on the Central Branch Union Pacific Railroad, no subpoena, citation, or other process was served upon it, nor did it appear as a party, and is, therefore, not barred by said decree of sale, and might still redeem the property or cause its resale on account of its subsidy lien. 396.
3. This railroad in accepting the assignment of the rights and the franchises of the Hannibal and St. Joseph Railroad Company, and the grant of lands, bonds, etc., conferred by act of Congress in aid of its construction, succeeded also to, and had imposed upon it, all the obligations with reference to the application of compensation for services of the Government toward the payment of these subsidy bonds. *Id.*

UNION PACIFIC RAILROAD—Continued.

4. One-half of the compensation due from time to time for the services rendered by this road for the Government should be withheld and applied upon the bonds issued by the United States in aid of its construction notwithstanding the foreclosure and sale of the same. *Ib.*

UNITED STATES COMMISSIONERS.

United States commissioners are not required to administer oaths to pensioners and their witnesses in the execution of pension vouchers free of charge. 86.

VESSELS.

For violating the law of August 2, 1882, providing that there shall not be in any compartment or space on a vessel occupied by passengers more than two tiers of berths, nor more than one person in a berth not double, the master becomes liable to a fine of \$5 for each passenger carried other than cabin passengers. 499.

See REGISTRY; PRIZE; SHIPPING ARTICLES.

VOLUNTEER ARMY.

See ARMY.

VOLUNTEER PENSION BRANCH.

See WAR DEPARTMENT, 1.

WAR.

1. Any troops assembled at camps in the United States for the present war purposes can properly be considered as operating against an enemy, although their respective service is confined to the ordinary routine of camp life. 95.
2. If at the time of the destruction of the *Alphonso XII*, she was a ship or vessel of war in the service of Spain, bounty may be recovered under section 4635, Revised Statutes. 171.
3. Notwithstanding the signing of the protocol and the suspension of hostilities, a state of war still exists between this country and Spain, as peace can only be declared pursuant to the negotiations between the authorized peace commissioners. 190.
4. The suspension of hostilities provided by the protocol of agreement between the United States and Spain is not tantamount to the termination of the war, but creates only an interval in the war and supposes a return to it. 258.
5. Hostilities between nations suspend intercourse and deprive citizens of the hostile nations of rights of an international character previously enjoyed. 268.
6. So long as a state of war exists between Spain and the United States, Spanish subjects have no right to the privilege of copyright conferred upon Spanish citizens by proclamation prior to the declaration of war. *Ib.*

WAR—Continued.

7. Property of a neutral, permanently situated within the territory of an enemy, is, from its situation, liable to damage from the lawful operations of war, and no compensation is due for such damage. 315.
8. There is no objection to the submission to Congress of the claim of the British Cuba Submarine Telegraph Company for damages by our vessels occurring during the hostilities with Spain. 654.

WAR DEPARTMENT.

1. The volunteer pension branch of the War Department was not within the classified service, and the fact that said branch was merged into the Record and Pension Division of that Department, which is now under the civil service, would not bring positions in it within the classified service. 6.
2. The effect of the act of March 2, 1899, is to change the rank and pay of the Chief of the Record and Pension Division of the War Department, and not to create a new office. 480.

WAREHOUSE.

See CUSTOMS LAWS AND REGULATIONS, 17-25.

WARRANTS.

Section 3477, Revised Statutes, with reference to the assignment of claims, applies only to such claims as require allowance by some accounting officer, an ascertainment of the amounts due thereon, and the issue of a warrant for their payment. 637.

WAR-REVENUE ACT.

See INTERNAL REVENUE LAWS AND REGULATIONS.

WASHINGTON.

See DISTRICT OF COLUMBIA.

WASHINGTON AND GLEN ECHO RAILWAY.

See DISTRICT OF COLUMBIA, 7.

WATER POWER.

See CONCESSIONS, 5.

WHARVES.

The act making an appropriation for "transportation of the Army and its supplies" impliedly authorized the Secretary of War to purchase for the United States such land as in his judgment may be necessary for the erection of the wharf or wharves as contemplated by the appropriation. 665.

WORDS AND PHRASES.

Where words are sometimes used in different senses, their meaning in a statute must always be construed in reference to the subject-matter of the enactment. 178.

WORDS AND PHRASES—Continued.

"ACCEPTED FOR TRANSPORTATION"—

The term "accepted for transportation," as used in the war-revenue law, means goods received from a shipper or consignee other than the carrier itself, and is intended to apply to goods received for transportation in the usual manner by common carriers. 252.

"ADVERTISE"—

To "advertise" means to give publicity through the medium of newspapers, handbills, circulars, or some similar way, so as to call particular attention to a subject-matter in order that people may identify it from the description given in the advertisement. 272.

"BOND"—

A bond is an obligation in writing and under seal, binding the obligor to pay a sum of money to the obligee. It is sometimes denominated a specialty, being under seal, as distinguished from a simple promise to pay not sealed. 368.

"BOOK"—

The term "book," as construed by the courts under the copy-right laws, includes a musical or other composition, though printed on but one sheet. 29.

"COMMERCE"—

Commerce is not restricted to the purchase, sale, and barter of commodities, but it includes navigation, intercourse, and the reception and transportation and delivery of passengers and freight by land and water, and also the means or instrumentalities used in such commerce, 501, 846.

"GOODS"—

The term "goods," as used in the war-revenue act of June 13, 1898, includes money. 178.

The word "goods" includes money, securities, and other choses in action. 192.

The terms "goods," "goods and chattels," and "goods, wares, and merchandise" have no invariable fixed meaning in legal construction. 178.

"IMMIGRATE"—

To immigrate is to come into a country of which one is not a native, and in which one has not acquired a residence or domicile. 353.

"LEGAL REPRESENTATIVES"—

The phrase "legal representatives" in the act of 1896 refers to those who may be charged with the administration of the contractor's estate, or as equivalent to the "assigns" of the contract as an integral thing. 156.

"MUNICIPAL LEGISLATION"—

The term "municipal legislation" is limited to that class of laws that relate solely to the internal affairs of the country and the relation of the people to each other. 627.

WORDS AND PHRASES—Continued.

"OBLIGATION OR OTHER SECURITY OF THE UNITED STATES"—

The definition given to the words "obligation or other security of the United States" in Revised Statutes, section 5413, is not intended to be general, but is limited in its application. 40.

"OFFICE"—

The word "office," as used in section 2 of the act of 1894, is to be presumed, in the absence of indications to the contrary, not to embrace such commissionership, because it is not what is called a constitutional office. 184.

"OR OTHER WORKS"—

The words "or other works" in this act are not to be interpreted according to their natural and usual sense, but are restricted to things of the same kind as those just enumerated. 332.

"PORT"—

The term "port" may comprehend the city or town occupied by the importers, merchants, and others, but it is not confined in its extent or its limits to the town. It includes the harbor, roadstead, and shores, and all other natural and local incidents which go to make up a locality which comprises both land and water. 306.

"PROFIT"—

Profit is the gain made upon any business or investment when both the receipts and payments are taken into account. 320.

"PROMISSORY NOTE"—

A promissory note is an unconditional promise to pay to another's order, or bearer, a stated sum of money at a specified or implied time. 368.

"RECEIPT"—

A receipt is a writing acknowledging the taking of money or goods, and may or may not be negotiable as the party by whom it is given may choose to make it or local law may provide. 283.

"SECURITIES"—

When the word "securities" is used in the property sense it refers to bonds, mortgages, certificates of deposit, certificates of stock, etc. In this sense postage stamps are not investments or securities. 40.

"SECURITY"—

The word "security," as used in the act of 1877 (1 Supp. R. S., 136), is an evidence of public debt, as a bond, or a certificate of deposit, or other subject of investment. 40.

"SURPLUS"—

The term "surplus," as applied to banks, includes not only the amount set apart as a minimum surplus, but also such amount as has been set apart by a vote of the directors or other authorized action of the bank to strengthen the capital, and is thus held out to the public as a part of its banking capital. 320.

WORDS AND PHRASES—Continued.

"TO ENABLE"—

The phrase "to enable" is in words only permissive and is governed by and does not govern the context. 295.

"TRAMWAY"—

Under Spanish law a tramway is a railroad constructed on a public highway. 551.

"TROOPS OPERATING AGAINST AN ENEMY"—

The phrase "troops operating against an enemy," as used in section 7 of the act of April 26, 1898, was intended to apply to all instances where the troops of the United States are assembled into separate bodies, such as regiments, brigades, divisions, or corps, for the purpose of carrying on and bringing to a conclusion the war with Spain. 95.

"WAREHOUSE."

A warehouse is a private institution in charge of a public officer, and the Secretary of the Treasury may establish rules and regulations not inconsistent with law for the due execution of the laws relating thereto and to secure a just accountability under the same. 152.

The place of business of a retail dealer in any commodity can not properly be termed a warehouse. 279.

"WAREHOUSE RECEIPT"—

A warehouse receipt is nothing more nor less than the written statement of the warehouseman that certain goods, merchandise, or property are deposited in his warehouse and held on storage for some particular person or persons. 283.

WRECK.

1. The provision of section 23 of the customs administrative act relieving the importer from the payment of duties on damaged goods by abandoning them to the United States refers to loss or damage arising from ordinary causes during the voyage and not to the extreme case of a wreck and loss or damage thereby. 542.
2. The merchandise taken from the wrecked steamer *Paris*, both hull and cargo of which were abandoned to the underwriters, the cargo being lightered from the wreck to the nearest available vessel of the same line, thus completing the interrupted voyage, may be regarded as merchandise taken from a wreck and entitled to entry by appraisement under section 2923, Revised Statutes. *Id.*

YUKON REGION.

See CONTRACTS, 20-22.

